

THE
LAW of LAWS.
OR,
The EXCELLENCE
OF THE
CIVIL LAW,



Above all other
HUMANE LAWS
Whatsoever.

Shewing of how great Use and Necessity
the CIVIL LAW is to this Nation.

By Sir ROB. WISEMAN, Knight,
late Doctor of the Civil Law.

*Ea verè præstabilis est scientia, quæ in fœderibus, pactio-
nibus, conditionibus populorum, Regum, exterarumque Natio-
num, in omni denique belli jure & pacis versatur. Cicero.*

That is truly an excellent knowledge, which is con-
versant about Leagues, Agreements, the several consti-
tutions of People, Kings and Foreign Nations, and lastly,
in the whole Law of War and Peace.

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THE
EPISTLE
TO THE
READER.

READER,

IF this Book were set forth in any other Language, for Foreigners to read, I were unavoidably driven to give them an account why I had put my self upon so superfluous and so unnecessary an undertaking, as to extoll and commend that, whose worth and merit is owned by all the World, and which every where shines so brightly, that it cannot be obscured by any, either Tongue, or Pen.

For it is very well known to them, that the *Civil Law* is the issue and

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product of that great and mighty State, the *Roman* Empire, that led so many Nations and People captive by their Wisdom; as much as by their Valour; that was once the School of all Moral Honesty and Goodness, and the Stage, whereon the whole variety of humane affairs was represented.

Neither need I tell them, that what through the prosperous success of that State, for which it was ordained, and what through the natural Equity that is to be read all along in it, and its being fitted for the general affairs of *Europe*, the Laws of most of the *European* Nations (who indeed all of them anciently were subject to the *Roman* Government) are but as Copies drawn from that Original, borrowing that lustre of goodness they have from it; and where their particular Laws fail, thither their Judicatories resort to be supplied.

They cannot be ignorant, That though every particular Nation has some few Laws of their own, proper for their occasions, government and people; yet no where beyond the Seas is there any profession or science
of

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of Law, but this; nor any Law accounted the Law of Nations, but the *Civil Law* onely: That time, practice, argument, and applying it to the several affairs of so many Nations where it has been used, has made it so perfect and so sufficient a body to decide all cases by, that are between party and party, and do not concern the publick government, that they stand in need of very few Laws of their own making; and without it no Laws they can make, would ever be able to serve their turn.

To those therefore that make such continual use of this Law in their Courts, and who suffer none to sit as Judges, nor plead at their Bars, but such as have been brought up in that faculty, and who strive to employ those onely in all transactions between themselves and other Nations: to them, I say, to praise and applaud this Law, that is dignified by them so many several ways, is so little needfull, that it were almost impertinent.

But to make known to the people of this Nation to whom it is rendred

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now so contemptible, how excellent it is in it self, how rational ; what a general approbation it has had with other Nations, and how very usefull it may be to the publick welfare of this Nation divers ways, it is a work so seasonable and necessary, that it may be done without either Apology, Preface, or reason premised ; and is no more than the present state of things calls for.

For when it is considered, what an account it has been in amongst us for many hundred years together ; how many causes, Civil, Ecclesiastical, Maritime and Military, it dealt in ; how the jurisdiction thereof ran through the whole Nation ; how very little it was beneath the profession of the Common-Law it self ; how many professours and practisers it maintained, and how much it did enrich them ; what a number of Students it encouraged ; what coercive power it was intrusted withall, and the many Courts the employment thereof lay in : And when we see, that now the causes thereof are cantonized, and like a spoil divided ;
some

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some carried to the Courts of Common-Law, some to the Court of Equity, others sent into the Countrey, some left without any rule or regulation at all, and nothing left entire to the *Civil Law*; and when the solid reason of that Law is crowded out by vulgar reason, the professors thereof scattered, the study thereof discontinued, the very Law-books for want of use here, all transported beyond Sea to other Nations, and all coercion taken away; It is so much worth the enquiring what the ground of this great change should be, that to be silent thereat were great stupidity.

That the fall of the Ecclesiastical Jurisdiction might be a reason to suspend the exercise of that profession in some causes for a time, till it were again settled, I admit. But why it should not under this present form of Government (if authority think fit) be restored again, as to a civil regulation of those very matters under the Civil Magistrate, no satisfactory reason can be rendered. I am sure,

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it can neither be rational, nor convenient, that they should be carried from the *Civil Law*, which was the known, established, and practised Law in those matters, unto the cognizance of those, that have neither Law, nor rule, nor skill to try them; especially when the so doing does inevitably draw after it the certain ruine of that whole profession.

It is therefore very well worthy the most serious consideration of those that sit at the Helm; That, since there must be a trial of those matters still, and again attending thereupon to one or other, (which is the Game every body hunts after :) *Whether the Publick is more concerned, that the profit of such conizances should flow into the Purses of others, no way apt or skilfull, than go to the maintaining and keeping up of such a learned profession, which this Nation cannot be without.*

And certainly, whensoever we see that profession laid aside (which for the publick good, I trust, I never shall) we shall find this Commonwealth

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wealth of ours made very much inferior and unequal to other Nations, with whom (as it is an Island, and now become an active one) it has and must have many ways to doe. In other things, as in strength, riches and alliances, we contend for advantage and superiority with them, why should we then suffer them to overmatch us in wit, dexterity, skill, knowledge, wisdom, policy, reason, or judgment, which that learning above all other, and experience together gives them?

The dealings that we may have with them, as they are not a few, but innumerable, even as many as there are things in the World to deal in: So some of them are of highest moment and consequence also; As, *Right to Kingdoms or Provinces, by Donation, last Will, Succession, or by Marriage; community or property of the Sea, and the rights of Fishing and trading there; freedom from Customs and other immunities granted to foreign Merchants; Precedency, amongst the Ambassadors of Princes and Republicks;*

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publicks ; Promises of protection and aid against enemies ; Entertainment and harbouring of Traytors or Rebels ; Interpretation of publick Leagues or National Contracts ; Not admitting of Ambassadors, or detaining them, or using them in any uncivil manner ; Making of War, or contracting of Peace ; Sending supplies to our enemies, or oppressing our friends and confederates ; Imbargo's, seizing upon our Merchants Goods at Land, or stopping our Ships or Goods at Sea ; The arbitrating of differences between Nation and Nation, frequently referred to Princes or other States ; Of the force of National Contracts, and of their duration, whether they shall bind successors, or die with the Princes that made them ; Latitude of Territory and Jurisdiction, either upon Sea or Land. These and such like are the transactions and matters, that may be frequently agitated and dealt in between us and other Nations ; wherein before we fall to an open War, we chuse to reason and expostulate the matter with them ; sometimes we think

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think it necessary to remonstrate the right of our cause to other Nations; sometimes to declare the state of the business to our own people: Neither of which can be done effectually and with advantage, nor shall we be able to hold any such argument convincingly, if we have not the perfect knowledge of the Law of Nations, and the learning of the *Civil Law*; which, to be sure, is the onely kind of Reason, that other Nations (knowing no other Common Law or Rule besides it for such matters) will encounter us withall.

And since we have such great need at this time of Armies by Land, and Navies by Sea, to defend us from factions at home, and enemies abroad, I would put it to those of the Military order, to consider, how not onely usefull, but necessary that profession is for carrying on of Military business also, as well by Sea, as by Land; and that all the Military discipline, and good government that they have in their Armies, and the right which they are enjoyned to afford to their
very

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very enemies, is directed by the rules and principles of that profession: for it must be acknowledged, that the Municipal Law, as to the carrying on of Martial affairs, is altogether impertinent, and of no use at all; the same being a Law usefull but in Peace onely.

But there are peculiar Laws, and a proper discipline for the state of War; *Sunt & belli sicut & pacis jura*; and they are accommodated to the very nature and exigencies of it: some of which are, *That there be solemn denouncing of the War intended, that all Dissenters may withdraw in time, and to divert other Nations from adhering; That it be prosecuted by just and honourable ways, without treachery, corruption, breach of faith, poison, or secret assassination, which the gallant Romans did disdain to act, though for never so great a victory: That all Articles and Capitulations made be strictly kept and observed, even towards Turks, Pagans, Jews, or Infidels; That they be interpreted in the plainest and most equitable sense,*
with-

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*without any art or subtilty at all; That an enemy after he has yielded himself, be not kill'd, but kept alive for exchange, or ranfome; That what is gotten from the enemy, is good and lawfull purchase, though it was newly taken from some of our own people or confederates, so that it were but once brought safe into the enemies Quarters; That the enemies Countrey, when it offers to yield, be not laid waste, burnt, or destroyed; That when a Town is to be stormed, women, children, aged, Ecclesiastical persons, so far as is possible, may be spared; That it be free to friends or confederates to trade with the enemy, so they carry neither victuals, money, arms, or ammunition; That the Countrey, through which the Army passes, no offence being given, be not injured, but kept from spoil and rapine; That Heralds or Messengers sent from the enemy be received and dismissed with safety; That strictness and severity of discipline, greater than in peace, be maintained within the Camp; the Valiant advanced to Honours, and admitted to partake in the spoil which
he*

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he did help to get ; the cowardly disgraced, the disobedient rigorously chastised, the incorrigible cashiered, and the aged and worn-out Souldier, be dismissed to ease with reward and honour ; That a difference of degrees be observed, and a subordination made, as the places of command differ ; That for Military offences, or contracts and promises made between Souldier and Souldier, the conizance thereof be in the Court Marshal, and to be tried by the Law of Arms onely ; That Hostages be taken and kept, and may be put to death, if the enemy prove perfidious ; That neither friends goods coming in an enemies bottom, nor a friends ship, though carrying enemies goods in her, be taken as prize ; That when a victory is gotten, the enemy subdued be used with all clemency and moderation ; That Privileges be granted to Souldiers beyond other men ; with an infinite number more, which are no-where to be found collected and laid together, but in the Books and Writings of the Civil Law ; which is the onely proper learning to teach and instruct in those matters.

For

To the Reader.

For it has been the Civilians work, to draw together as it were into one body and systeme, all that the *Civil Law* it self does afford ; and whatsoever else can be gathered from the testimonies of the ancient Philosophers, Historians, Poets and Orators, in what they are all, as it were by the light of nature, consenting in one and the same judgment ; also what has been delivered by the ancient Fathers and most approved Canons of the Church on that subject ; and especially to bring into argument, what has been constantly upon the same occurrences in War, judg'd and practis'd by the most War-like and Heroick Nations, that have been ; as the *Græcians*, *Assyrians*, *Medes*, *Persians*, *Lacedemonians*, *Carthaginians*, but especially the *Romans*, with whom for experience and discipline in War, and justice and bravery towards their enemies ; no Nation that ever acted on this great Theatre of the World, is to be compared : And so by these helps, the Laws of War in use at this day, have been made and perfected, onely through the Civilians pains and industry ; neither

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ther are they to be met with any where together, but in their Books and Writings.

And therefore since this profession is so usefull and necessary for the Souldiers business also, that they cannot promise to themselves any good order, wise conduct, or happy success with their Martial enterprizes, but by that light and direction which it affords, it is evident, that it could never be worse spared or discountenanced, than now at this time. Which I humbly leave to be farther thought of by the wisdom of those that rule over us.

And so desiring thee to excuse me this once, for appearing thus in publick, being upon so pressing an occasion, as to revive (if by such weak endeavours it were possible) a whole profession, almost quite expiring, I bid thee farewell, and remain,

Thine in all possible respects whatsoever,

Ro. Wiseman.

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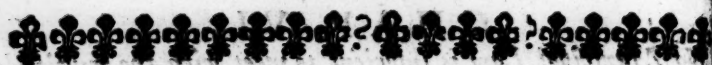
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Wesen-



W E S E N B E C. Parat. Dig. De Just.
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IN constituendo expoliendoque jus Civile, Populus Romanus tantum reliquis Nationibus, velut & gloria belli præstitit; ut si omnia omnium gentium instituta, mores, leges in unum conferantur, nequaquam sint cum his Romanorum legibus & institutis, prudentia, æquitate, pondere, ubertate, ullo modo comparanda.

The People of Rome did not onely go beyond all Nations in the World besides in renown for their warlike enterprizes, but so much in establishing of Laws too; That if all the Laws and Customs of all other Nations were all laid together, they would come far short of the Roman Laws, both for wisdom, equity, weight, fulness.

LEX LEGUM:

O R,

The LAW of LAWS, &c.

The first Book.

CHAP. I.

*That a Law ought to be agreeable to
true Reason.*

THERE is nothing under the Sun,
that doth more conduce to the
Prosperity and Peace of a Na-
tion, than fitting and well-composed Laws.

In the framing whereof, those that have
the Ordaining Power, must be heedfull to
observe many things, to make their Laws
proportionable to so happy and so blessed
an end.

A Law must not enjoin any wicked,
ignominious, or unbeseeming things, these
being in intendment of the *Civil Law* im-
possible

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possible. *Quæ facta ledunt pietatem, existimationem, verecundiam nostram, & (ut generaliter dixerim) contra bonos mores sunt, nec facere nos posse credendum est,* says Papinian. Those

^a L. 15. Co.
de condit. Inst.

^a actions which wound Piety, Reputation, Modesty, or in brief, are generally disallowed by the practices of sober men, may be reckoned in the number of those things which nature admits not to be done.

It must not be obscure, but certain in the Intimation, just in the Precept, profitable in the Execution, agreeing with the form of Government, customs, places and time, where and when it is to be applied. It must be sufficient for the defence of Propriety, for the encouragement of Labour, for the safeguard of the Subjects persons, for determining Controversies, for reward of noble Actions, and excellent Arts, and rare Inventions; for promoting Trade enriching the People, and must wholly advance the publick good.

But above all things, the care of the *Legislative Power* ought to be solicitous in nothing more, than to frame and fashion their Laws ^b by that great and exemplary pattern, the *Law of Nature*, and to enact or decree nothing dissonant unto true inbred and *Natural Reason*, whereby a Man worketh according to God, according to himself, *Nature*, the universal order and policy of the world, quietly, sweetly, and as silently without noise, as a Ship that is not

^b Plutarch saying that Kings ought to be governed by Laws, explains himself, that this Law must be a word, not

not driven but by the natural and ordinary course of the Water: For when the Wisdom and Power of God first bestowed upon Man *Understanding* and *Reason*, he intended them as guides and directors in all the actions of his life, and thereby to discern what was good and what was evil, by that very light that shined within him. When therefore the commands of a Nation are irrational and senseless, that light is as it were put out and extinguished, and Subjects are made to obey rather like Beasts than Men.

written in Book, and Tables, but dwelling in mind; a living rule, the interiour guide of their manners, and monitors of their life.

And therefore *Tully* said, as he is quoted by *Carbo*, ^c *Nos legem bonam à mala, nulla alia ratione nisi naturæ normâ dividere possumus*, We cannot discern a good Law from a bad, otherwise, than by comparing it with the *Law of Nature*. And therefore he will have it to be *justorum injustorumque distinctio, ad illam antiquissimam & rerum omnium principem naturam expressa*: a rule discriminating that which is just, from that which is unjust, delineated and drawn forth by the old Original of Nature, and says it is the highest or chief reason grafted in Nature, commanding those things which are to be done, and forbidding the contrary.

^c *Traſſat. de legib. lib. 6. diſp. 8.*

And again: ^d *Initium juris à natura profectum, deinde quædam in consuetudinem ex utilitate rationis venerunt, postea res à natura profectas & à consuetudine probatas legum metus & religio sanxit*: The beginning of

^d *Lib. 2. De Inven.*

all Law did proceed from Nature it self, but afterwards there were certain things which were by evidence of Reason found necessary, and thereupon brought into common practice; and at length, the fear and reverence of Laws did settle and enforce what had been so taught by Nature, and Custome it self had allowed of. So that the Act of the Law, is but to see that effectually observed and executed, which Nature hath ordained, and which the common Reason and Custome of men doth declare to be just, equal and necessary.

* *L. de legib.*
lib. 1.

† *L. 3. de rep.*

And sometimes the same, * *Tully*, styles Law the very force of Nature, the *Understanding* and *Reason* of a wise Man, the rule of right and wrong, And † defining Law as it ought to be, rather than what generally it is, he terms it right reason, spread over all people, durable, everlasting; which, as fire burns every where alike, is not one at *Rome*, and another at *Athens*, one now, and another hereafter, but being the same and unalterable, serves for all times, and runs through all people, which began not when it was first written, but when it first sprung forth from Nature.

‡ *In Min. de rep. & de legib.*

Plato § will also have it a reasonable rule, leading and directing men to their due end, for a publick good, ordaining penalties for them that transgress, and rewards for them that obey. And *Isidore*, who requires other properties in a Law, requires

requires this Reason too; for in his ^b Ety- ^b Lib. 3. cap. 3.
mologies he says, *Lex erit omne quod ra-*
tione constiterit duntaxat, quod religioni con-
gruat, quod disciplina conveniat, quod saluti
proficiat; A Law shall be that, which may
stand with Reason, agree with Religion,
suit with the education and dispositions of
the people, and be beneficial to the pub-
lick welfare. With ⁱ Aquinas also, *Lex* ⁱ Prim. se-
humana est quoddam dictamen rationis, quo ^{cund. qu. 97.}
diriguntur humani actus; Humane Law is a ^{Ar. 1.}
dictate of Reason, by which humane acts
are steered. And again, ^k *Lex nihil aliud* ^k Quest. 71.
est quàm quoddam rationis ordinatio ad bonum ^{Art. 4.}
commune, ab eo qui curam communitatis habet,
promulgata: A Law is nothing else but a
transferring or applying of Reason to the
common good, manifested to all the people
by him who hath care of the Common-
wealth. The *Civil Law* speaks the same
thing, ^l *Lex est commune preceptum, virorum* ^l L. 1. Dig.
prudentum consultum, A Law is an universal ^{de legib.}
and generally known precept, *Notitia equi*
et boni à natura omnibus indita, as ^m Gothofred ^m Lib. 1.
explains it, ingrafted in Man by Nature,
and the result of sage and understanding
men.

All ⁿ Civilians without any contra- ⁿ Minusius
diction do consent and agree, that the ^{Inst. de jur.}
true Law of a State is but *Determinatio* ^{Nat. gent. et}
juris naturalis, a declaring or expounding ^{Civ. in privs.}
in such particular cases or accidents, as
most frequently happen amongst men,

what the *Law of Nature* intends by its general precept; or it is a rational distinguishing upon the *Law of Nature*, making it to be of force in some cases, not of force in others, with such directions for observing the same, and kinds of punishment to the offenders, as the wisdom of each state shall judge most rational, and most convenient. Not to Steal, not to commit Adultery, not to Kill, Nature it self taught in general: but who should be said to Steal? who to commit Adultery? who to Kill? what proof should be sufficient to convict a Man of these crimes? who might be the accusers, how and in what manner, and before what Judges the offenders should be proceeded against; what punishments they should suffer, and after what time no accusation for them should be heard, because the *Natural Law* did not teach in particular, therefore the Law of every State doth determine them; which as it is done in pursuance of the primary precepts of Nature, so must it be done too with the soundest judgment and reason, having an eye to the matter of the precepts, to the Nature of the people, and to the state of the Common-wealth it self. And these several particulars being thus determined and put into a Law, they adopt to themselves the name of a *National Law*.

° L.6. Dig. de ° *Jus Civile*, says Ulpian, *est quod neque in Just. & Jur. totum à naturali jure vel gentium recedit, neque*

Cap. I. *The Civil Law.*

2

que per omnia ei servit; Itaque cum aliquid addimus vel detrahimus juri communi, jus proprium, id est, Civile intelligimus. The Law of a people is that, which neither doth wholly estrange it self from the Law of Nature, or of Nations, nor doth strictly follow them in all things neither: when therefore we add or diminish ought from the Universal Law, we make it thereby a peculiar Law, and give it the denomination of a Civil, or Municipal Law; so that the Roman Law will have no other material difference to be between the Law of Nature, and the Dictates of Reason, and the Law of a State, but that what was before common and universal in notion, is now by distinguishing it into cases, by fitting it with proper circumstances for more ready execution, and by moulding it into a form, appropriated to peculiar use.

The Canon Law that enumerates all the essential properties of a Law, doth exact also that it be honest, just and agreeable to Nature: *P Erit lex honesta, justa, possibilis* p Cap 2.
secundum naturam; secundum patrie consuetu- Dist. 4.
dinem, loco temporisque conveniens, necessaria,
utilis, manifesta quoque, ne aliquid per obscu-
ritatem in captionem contineat, nullo privato
commodo, sed pro communi civium utili-
tate conscripta: A Law shall be honest, just, possible, according to Nature, suiting with the customs of the Countrey, agreeing both with place and time, necessary,
B 4
usefull,

usefull, and also plain, lest through obscurity it may ensnare; nor made for private advantage, but for the common good of all the people.

Thus by the Judgment of all, *Ratio est anima legis; Lex tunc laudatur, quando ratione probatur: Nature* is the Fountain, and Reason doth animate and make the Law, and gets it the praise and acceptation. This indeed is a lightning and raye of the Divinity; *Ratio nihil aliud est, quam in corpus humanum pars divini spiritus immersa,* says ^a Seneca: It is the stream and dependence of the eternal Law, which is God himself and his Will. *Quid natura nisi Deus, & divina ratio toti mundo & partibus ejus inserta?* What is Nature but God, and Divine reason inserted into the whole world, and immixed in all the parts thereof? The Law of Moses in his Decalogue is an outward and publick Copy, the Law of the twelve Tables and the Roman Law, the moral instructions of Divines and Philosophers, the advertisements and counsels of Lawyers, the edicts and ordinances of the best Princes are no other but draughts and particular Pourtrayes of it.

^a *Lex nihil aliud est, nisi verba, & à numine Deorum tracta ratio,* Cicer. *Phillip. 11.*

If therefore there be any Law, that varieth from this first and original Mistress, commanding where she forbids, or forbidding where she commands or allows, it is a monster, falsehood and error. As for example, *Adversus periculum naturalis ratio per-*

permittit se defendere. Itaque si servum tuum latronem insidiantem mihi occidero, securus ero,

says ^r *Gaius*. Natural Reason gives a

^r *L. 4. Dig. Ad l. Aquil.*

man licence to defend himself again any danger, therefore I am in no danger of the

Law, if I kill thy Servant that lyes in wait to mischief me. Again, *Si percussorem*

ad se venientem gladio repulerit, non ut homicida tenetur; quia defensor propria salutis in

nullo peccasse videtur, says *Gordian* the ^r *Em-*

^r *L. 2. Co. Ad l. Cornel. de Sicar.*

perour: If a Man shall strike him dead that comes to destroy him, he shall not be

punished as a Man-slayer, because the preserver of his own life offends in nothing.

That Law then surely is very unnatural, that inflicts forfeiture of any part of his

estate, though it requires not either the whole or his life, upon any person, for

slaying another in his own just and necessary defence; whenas if he had not done

as he did, he must have been in peril of losing his own life.

It is as prodigious to natural equity and good reason, that a man that is unhappily

peradventure doing of a lawfull act, not purposing the least mischief to any person,

but by mere chance authour of another's death, should be subject to any punishment or loss whatsoever. *Mera infortunia*

nec pœnam merentur, nec ad restitutionem damni obligant, says ^u *Grotius*. No man deserves

^v *De Ju. Bell. Lib. 5. cap. 11. sect. 4.*

to be punished, or is bound to make any reparation for pure casualties. If an arrow
being

being shot at a Beast or at Butts; lights upon a Man and kills him; or a stone cast over an house or an arme of a Tree being cut, and falling, where seasonable warning is given to all that are near to take heed, be the cause of another's death, such casual Homicide is not in any kind punishable.

▪ L. 5. Co. ad
l. Cornel. de Si-
car. sect. 5. Inst.
del Aquil.

⁊ Numb. 35.
15. 22.
Josh. 20. 3.
Deut. 19. 5.

▪ A Law therefore that punisheth a man for such adventure or misfortune, is not a just or rational Law, being indeed repugnant to the *Law of God*, which protected such persons, and appointed them a City of refuge to flye unto; ⁊ for such an act happening in such sort seemeth to be the work of God himself.

It is a cruelty also, which Nature and Reason abhorreth, that a King, who ought to be as a Shepherd and Guardian of his people, should have an established liberty to endanger his Subjects lives and liberties, by a criminal accusation brought against them; and yet they be denyed the natural liberty and freedom to defend themselves, by bringing that Evidence, and assistance of counsel, that may serve to clear them. Indeed all kind of awfull submission and reverence is due to the Prince from his Subject; but that is no way impeached by a modest and fair defence. And therefore by the *Civil Law*, in any matter of complaint that was brought by the public Exchequer, whether Criminal or Civil, the defendant had his full defence most free. *Defensionis facultas danda est his*

quibus

Cap. I. The Civil Law.

II

quibus aliquam inquietudinem fiscus infert : ^a L. 7. Code
Liberty of defence ought to be granted to ^{Jur. fisc.}

those, whom the Exchequer brings into any trouble. And whosoever is impeached as a Malefactor, that Law is so indulgent to him, till he be convicted, that if he be in prison, the Magistrate is to make known by open Proclamation, what day he intends to hear him; *Ne hi qui defendendi sunt*, says

^a *Paulus, subitis accusatorum criminibus op-* ^a L. 18. Sect.
primantur; quamvis defensionem quocunque ^{9. Dig. de}
tempore, postulante reo, negari non oportet; adeo ^{Quest.}

ut propterea & differantur & proferantur cu-
stodia: Lest they which are to make their defence, be too suddenly brought to tryal by their Accusers, and thereby destroyed; Howbeit the Court shall not deny to hear their defence at any time, when themselves will ask it; for which cause, the Prisoners may have a certain time set at first, and then if cause be, farther day also may be given.

And though, when the person accused is not under restraint, if he shall not appear to answer the accusation, some time with- ^b L. 4. Dig.
^{De requir. vel}
^{absent. damn.}
^c L. 2. co. De
^{Requirend.}
^{rei.}

in a year after Summons had, his estate is irrecoverably lost, and forfeited to the Exchequer, and for that he shall never be heard more ^b: yet as to save him from personal punishment, neither the expiration of a year, nor the efflux of any time shall bar him but that he may still be heard to defend himself ^c: For self-preservation is so ^d ^a *Hoc & ratio*
^{doctis, & mos}
^{gentibus, & se-}
^{ris natura ipsa}
^{prescriptis, ut}
^{omnem semper}
^{vim à corpore,}
^{à capite, à vi-}
^{ta sua propul-}
^{sarent. Cic.}
^{it, pro Mil.}

tural, that a Law that is set up to infringe

it, may justly seem to fight against Nature.

These Laws therefore, and such like, as do thus cross and encounter common sense, and natural Reason, are no fitter to be styled Laws, than the dead Carcass of a Man, that is destitute of the essentials of Life, Soul and Reason, can be called a Man. And therefore Tully did set down the truth, when he taught, *Eos qui pernicioſa & injuſta populis juſſa deſcripſerint, cum contra fecerint quam polliciti profeſſique ſunt, quidvis potius tuſiſſe quam leges*; They that did promulgate to the people pernicious and unjuſt Laws, ſince they did clean contrary to that that they always promiſed and profeſſed to doe, they might better be thought to enact any thing elſe than Laws.

And though it be never or very rarely ſeen, that any State doth ſuffer any law to paſs them, which doth directly cross the chief and fundamental *Laws of Nature*, or which-oppoſes the firſt and main principles of *common Reason*, as to give direct licence to Atheiſm, Theft, Adultery, Homicide, invading of the rights or poſſeſſions of others, Breach of Faith or Covenant, Rebellion againſt Magiſtrates, Diſobedience to Parents, abandoning of Children or ſuch like, (for this were too odious and deteſtable, and would preſently diſſolve all ſociety and government :) Yet the care of a Legiſlatour doth not determine here, but muſt extend farther alſo, if they will have their

their Laws to be of one complexion and likeness, and all to agree with the *Laws of Nature*, and the dictates of *sound Reason*; for to each of those first and fundamental principles, there are divers inferiour things and actions appertaining, which do mediate or immediately depend upon, and refer unto them, standing some in a nearer, others in a remoter distance from them; but all so knit and conjoyned with the first and main principle, to which they are subordinate, and do as it were wait upon, that if any of them be settled by a Law, or practised otherwise than they ought to be, the first and great principle also by consequence is violated and broken, or at least an occasion offered to violate and break it: and therefore the Legislatour's care must be to settle these inferiour and subordinate things also in such wise, as that they may not encounter with any chief or fundamental rule of Nature, to which they may have any reference or application. For instance, That Parents should educate their Children, and supply them with maintenance, is a Law proceeding from Nature. And though no humane Law was ever found, that discharged Parents of such their duty, yet if a Law shall leave it free to a Parent when he dyes, to give away all from his own Children to a stranger, or to dispose of all to one child, without making any provision for the rest; is not

*'Co. de alend.
Liber.*

not that fundamental Law of Nature thereby consequentially infringed and broken? By the *Roman Law* therefore which does strictly tye all Parents to this Duty ^g, there is such a proportion due to Children out of their Parents estates, when they dye, as the Parents, but upon certain causes just and true, cannot give away from them, which was the third part, if there were four children or under; or half of the whole substance, if there were more, amongst them all; the rest they might freely give away to whom they pleased. And this the Law made so sure to them, that though the Father for some offence did suffer Death, and his Estate was confiscated, yet half the Estate should go to the Children notwithstanding: *Ne alieno admissio, graviores poenam luerent quos nulla contingeret culpa*, ^g Lest the Fathers fault should prove a sharper punishment to them that offended not, except the fault were *Treason*, in which case, for terrour to others, they lost all: *Ut charitas liberorum amiciores parentes reip. redderet* ^h; That their very affection to their Children, knowing how greatly they were like to suffer after them, might make them timorous how they so offended.

^g L. 7. dig.
de Bon. dam-
nat.

^h L. 8. dig.
quod metus
caus. sect. fin.

Likewise, if the Parent shall make no Will, nor make any disposition of his Estate in his life time, but dye intestate, if, when one of the Children hath entred upon

upon his Father's Estate, though by lawfull Authority, the Law of a State shall adjudge the whole Inheritance unto him, and not admit any of the rest of his Brethren and Sisters, how many soever they be, to divide or to have any share with him, neither in real Estate, nor personal; surely this is a contradiction to that Original Law of Nature, that binds Parents to provide for all those that are of the same Flesh and Bloud with them, for what themselves cannot doe being dead, their Estates ought to perform. The Civil Law therefore, making no difference between Land and Goods, nor between Eldest and Youngest, nor Male and Female, divides the whole Estate, real and personal, equally amongst the Children.

Ratio naturalis quasi lex quaedam tacita, liberis parentum hereditatem addicit, velut ad debitam successionem eos vocando, says ⁱ Paulus: There

is as it were a secret Law made by Nature her self, that settles the Parents Estate upon the Children, calling them to succeed as in their proper right. And, *Omnia qua*

nostra sunt, liberis nostris ex voto paramus, says ^k Tryphoninus; All that we do possess, we professedly destine to our Children.

Neither does it give one child any advantage against the rest, that he has first lawfully got into possession, for he has but thereby made himself subject to be sued by the rest, to come to a Partition with them

ⁱ D. l. 7. Dig. de Bon. damn. l. 7. Dig. si Tab. testam. null. f. 1.

^k L. 50. Dig. de Bon. libert. sect. 2.

¹ *Tot. Tit. dig.* them ¹; for Action to divide, being once
& Co. Famil. brought, the Judge is told by ^m *Paulus*,
ercisc. what he must doe; *Judex familia erciscunde*
^m *L. 25. secl.* *nihil debet indivisum relinquere.* The Judge
20. Dig. Eod. of a Partition ought to leave nothing un-
divided. A Law then that forbids Parents
to cast off the care of their Children, as
Nature does, does not agree with Nature,
nor with it self neither, if it does not as
the *Civil Law* does, make its other consti-
tutions suitable, and put it out of the
power both of Parents and Children,
by fraudulent ways to make their grand
Law of Nature, and *Dictate of Reason* fruit-
less and of no effect.

Likewise it is not sufficient, that the
Law of a State has not declared any
thing against Honour, Reverence, and
awfull respect, which Nature it self has
enjoynd Children to yield unto their Pa-
rents, except it does dispose and order the
actions and demeanour of Children an-
swerable to that very duty; for if a State
shall give Children a freedom to bring like
actions and accusations against their Pa-
rents as against others, or to Marry with-
out their consent, or to give in evidence
against them, or shall not punish them
when they offer violence to their Parents,
or speak reproachfully against them; the
reverential respect so due by Nature to
Parents, will soon be turned into con-
tempt and scorn. The *Civil Law* there-
fore

fore has not onely said, *Filio semper honesta*

& *sancta persona patris videri debet* ⁿ; The ⁿ L. 9. Dig.
person of a Parent ought to be reputed by ^{obseq. parent.}
a Child as Venerable and Religious: But ^{& patron. pra-}
in order to this, it also has forbidden ^{stand.}

Children to Marry without their Fa-
thers consent first obtained, which if
they doe, the Marriage is made void ^o. ^o L. 18. Dig.

Likewise, *Si filius matrem aut patrem, quos* ^{de vit. nupt. l.}
venerari oportet, contumeliis afficit, vel impias ^{7. Co. de nupt.}
manus ei infert; praefectus urbis delictum ad ^{Inst. cod. in}
publicam pietatem pertinens, pro modo ejus ^{princ.}

vindicat: If a child shall utter opprobrious
words of Father or Mother, whom he
ought to have in veneration, or shall lay
wicked hands upon them, the Magistrate
shall punish it as a publick offence, and
as the quality thereof deserveth ^p. It will

not suffer Children to bring any criminal
accusation or exception against their Pa-
rents, whereby their credit may be im-
pared ^q; nor commence any suit at all ^q L. 2. Dig.
against them, except special leave from ^{cod.}

the Judge be first gotten ^r. Nor put a
parent to the Oath of calumny, ^r as may ^r L. 2. & 13.
be done to all parties besides, that are ^{Dig. de injus}
in judgment, lest it should thereby be sus-
pected, that he does calumniate with his
own Child. Nor shall a Child be heard
as evidence against his Parent, though
he offers himself to be a witness against
him ^r. Again the Laws of all States pro-
fess to abhor all fraud, deceit, and cir-
cum-

stances, ^r L. 6. Co. de
Test. ^{Test. in iur. l.}

stances, ^r L. 7. sect. 3.
Dig. de obseq.

stances, ^r L. 7. sect. 3.
Dig. de obseq.

stances, ^r L. 7. sect. 3.
Dig. de obseq.

stances, ^r L. 7. sect. 3.
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stances, ^r L. 7. sect. 3.
Dig. de obseq.

stances, ^r L. 7. sect. 3.
Dig. de obseq.

stances, ^r L. 7. sect. 3.
Dig. de obseq.

cumvention in all contracts and dealings amongst men, as Nature it self and the common voice of Nations has forbidden, for but upon confidence of honest, upright and fair dealing, no trading, intercourse, or correspondence could be secure. Yet if the Law of a State shall onely admonish all that buy, barter, or exchange to be cautious and wary at their own peril, and when they be cheated with any unsound and corrupted Merchandize, or in the price beyond all measure, if it shall leave them helpless and without relief: Or if a State shall give licence or toleration to Debtours to pass and convey away all their Estates, thereby to deceive their Creditours, so it be done before action brought: or if practices of collusion may be used, or feigned actions brought under counterfeited and fictitious names, and in colourable and fallacious forms, on purpose to defeat others of that right which was intended them, or to delude the Law, by transferring a right thither, whither lawfully it ought not to go; where then will honesty, truth and faithfulness, so requisite in all affairs acted amongst men, be? And therefore the Civil Law does not onely say, in the general,

In omnibus contractibus bona fides requiritur;

" Schonidw.
Inst. de action.
s. actionum
nu. 6.

And, *Naturalis suadet equitas, ut ex bona fide contrahatur:* " All Contracts must be made with honesty; and natural Equity invites

invites us to honest dealing. But it comes to particulars also, and will allow of deceit no where: for if a man be deceived in the price of a Commodity bought, *supra dimidium*, above half the value of it (for so far as to half, inequality of value is born with for avoiding endless challenges, *Et ne omnis obligatio emptionis & venditionis semper sit in incerto*, that all uncertainty in buying and selling may be removed *) the seller at his election shall be enforced either to take his commodity again, or restore to the buyer what he has taken above the true worth of it. *Immodica lasio excedens dimidium justı pretii, gravior est quàm ut toleretur*; An immeasurable prejudice, which exceeds half the just value, is more than can be born withall. Be if the fraud be not in price, but does infect the contract or act done in another kind, the Judge has commission either to disannull the thing, or to take such order that the deceiver may not gain by his evil subtilty, nor the other lose by his simplicity and weakness †.

If a diseased or unmerchantable commodity be sold, and the defects thereof not visible, the *Civil Law* will compell the seller to take it again, and give the buyer his money back: ‡ Or if a seller shall tell the buyer, that the thing sold is thus and thus qualified, by which, the buyer that cannot see whether it be so or no till some good trial had, is induced to give the more, and

* L. 2. Co. de rescind. vend.

† L. Dig. si quis caut. l. 134. f. 1. di. de. reg. jur. 2. ‡ L. 155. Dig. de reg. jur.

• Dig. de adi. edit.

afterwards it is found clear otherwise, the seller is to give so much back, as the thing is less worth by those qualities which are wanting. *Nam ea quæ commendandi causa in venditionibus dicuntur, venditorem obligant, nisi palam sint*: Those qualities or conditions, which any thing that is sold is commended for, must be made good by the seller, except they be such as the buyer may be by his own view certified, that they are not so good as they are spoken.

^b L. 43. Dig. de contrah. crupt.

^b Likewise if a man shall sell Land, House, or any thing else, to which he cannot make a good title, but is recovered by another, though he never undertakes to warrant it or make it good, yet *emptorem indemnem servare debet*, he shall save the buyer harmless, because it doth naturally arise without any special covenant out of the bargain it self, that the buyer shall either quietly enjoy the thing, or at least be indemnified by him that sold it. ^c And if a man shall

^c L. 11. Dig. de act. empt. 1. 6. Co. de evict.

pass away his Estate to defraud his Creditors, leaving nothing, or not enough in himself to satisfy his just debts that he had contracted before; the *Civil Law*, without distinguishing whether it was done before action brought, or after, revokes it out of the hands into which it was put, and reinvests the debtour in it, and makes it as liable to his debts, as if no such thing had been done. ^d Nei-

^d Dig. quæ in fraud. cred.

ther does it onely disallow but punish also those

those that do prevaricate and help the cause of their adversary, by waving their own just pleas, and wilfully failing to prove what they may, and in shew undertook to do. ^e It will not suffer any such combination or practice of colluding to have any effect to the taking away or prejudicing of the right of any person that is concerned. For if the Executour of a Will shall combine with any of the next of kin to make the deceased dye intestate, and thereupon does faintly defend it in Court where it is in question, and subducts or conceals those proofs that should uphold it, whereby for want of proof it comes to be overthrown; this shall not prejudice the legataries; for they shall notwithstanding this Judgment thus by fraud obtained, be heard to maintain and set up this Will again. ^f And as no man shall be prejudiced, so none shall reap any advantage by the fraudulent practice of another neither, though he was no party nor actour in the fraud himself; *Alterius circumventio alii non prabet actionem.* ^g One ^h L. 14. Dig. de appellat. man's fraud shall not create in another any right to sue. ⁱ L. 49. Dig. de reg. jur.

The *Civil Law* can as little endure that the true sense and meaning of a Law should be destroyed by a fraudulent interpretation that keeps the words, but perverts the end for which it is made: *In fraudem legis facit, qui salvis verbis legis sententiam ejus circum-*
venit;

*venit ; frans legis fit, ubi quod fieri noluit, fieri
 L. 29. 30. autem non vietuit, id fit. He deals deceit-
 Dig. de legib.*

fully with the Law, that transgresseth the true intent of it, though he does not trespass against the formal and precise words. And therefore when the Law forbids a man to settle any more upon his Bastard, than what will barely keep him alive, it will not permit him to settle any superfluous estate upon any other person for that Bastard's use, or the Bastard to receive any such estate from his Parent by another hand : *Cum quid una via prohibetur alicui, ad id alia via non debet admitti* : That which cannot lawfully be done one way, or directly, must not be done indirectly, or by another.

*Reg. 84. de
 reg. jur. in 6.*

In like manner, as nothing is more precious among men than Life, Property, good Name, Liberty, and the right of Contracts, in the which the whole civil interest and welfare of all people may be rightly said to be comprised : So it is not enough to provide in a general way for them neither ; for it does not suffice to declare by a Law, that neither the Life, Property, nor Liberty of any Subject shall be taken away, but by course of Law, and a lawfull trial first had ; nor to forbid calumnies and slanders ; nor to command that the contracts and agreements of men shall be mutually observed : but a special and most vigilant care is to be had also, that

that all proceedings of justice, when a suit is brought concerning any of them, be answerable to those great interests, and that nothing be admitted which can any way, though obliquely or afar off, infringe or overthrow any of them. Whereof the Civil Law is so tender, that by bringing the Action, a man's right is rather improved than made worse : *Nemo in persequendo deteriores causam sed meliorem facit :*

^k To try a man's right is rather an advantage than any prejudice.

^k L. 87. Dig. de reg. jur.

When therefore any of these rights be in question, if the Law of a State be so short and defective, as that a mischief may be done, and yet no remedy be found, or not a sufficient one ; or if a prejudicial act may pass against me, that may endanger my whole right in the end, and I not present thereat, nor called unto it ; or if I have not liberty to examine my adversary upon his oath, to something which will clear the whole matter, and whereof I have no other testimony but his own conscience ; or if I may not be admitted to make out the matter as well by violent and strong presumptions, as by clear and manifest proofs ; or if the testimony of one onely witness be sufficient in any matter whatsoever to cast and condemn me ; or if where I cannot have my witness to the Bar through sickness, or absence beyond the Seas, there be not some expedient

dient allowed to have his testimony upon his oath sent to the Court where my trial is to be ; or if such just exceptions as may take away, or at least extenuate the credit of the evidence brought against me, will not be allowed ; or if the Justice of a Nation be too quick and over hasty in concluding upon the rights of men, before they can well prepare to defend them, or on the contrary, be too slow and tedious, as not limit a time, when suits shall determine of themselves, if they be not judged before ; or if one sentence shall be so final, that I may not appeal, nor bring my right to a trial any more : I say, where these proceedings, or such like be allowed and practised, whatsoever is most pretious and of highest value amongst men, be it Life, Property, Good name, Liberty, right of Contracts, or whatsoever else is flying to the sanctuary of the Law, it is subject to be destroyed and taken away. For whether the rights of a people be prejudiced by an irregular way of bringing them to trial and judgment, or by the iniquity of those Laws that shall judge them in the end, the mischief is all one. A State therefore that will sufficiently provide for defence of their peoples rights, must not onely take care that the Laws that must definitively over-rule and determine them, be equal, just and rational, but the forms of trial must be the same also,

also, that the same security and just dealing, which is the end of both, may be obtained.

And herein the *Roman Civil Law* has been more exact and carefull than some other Laws of the world have been; for there is nothing, of what nature soever it be, but the Civil Law has ordained a means to bring it to a discussion and trial, either by giving a special Action in the case ^l, or a general one ^m, relieving by ordinary remedies; or if those fail, by such as are extraordinary ⁿ, helping men *jure actionis*, or *officio judicis*, that is, by way of complaining in their own name, or borrowing the name of the Magistrate ^o to make their complaints more effectual, so that one way or other a remedy may be had, whatsoever the evil be; nor does it suffer any just complaint to go away unremedied. And although it gives the highest authority to Orders and Decrees of Court, yet it is so tender of, and has such a heedfull respect towards the Rights and Interests of men, that whether a man be concerned alone in a cause, or whether others be concerned with him, it allows of no Act, Order, Decree, or Judgment, but against those onely, that were first call'd to see it done. And therefore every judicial act done without warning given, is accounted surreptitious, and declared void and null ^p. The effect of which nullity

^l Tot. tit. inst. de action.

^m Dig. de præscript. verb. & in fact. action.

ⁿ Tot. tit. Dig. & lo. de in integr. res. titu. ^o Gl. in fact. action. Inst. de Action. verb. quam jus.

^p Marant. f. ec. part. 4. Distinct. num. 10.

is,

is, that as to him that was absent and not heard, the cause is to begin again; *Judicatum tantum inter presentes tenet*, says *9 Paulus*; Those that are in Court onely, are bound by that which is decreed.

9 L. 17. Dig. de re Judic.

Neither shall a man lose his right for want of witnesses to prove it, for if the matter was transacted between him and his adversary onely, so that his adversary being brought upon his Oath, must needs confess the whole matter; the Law will enjoin a man to answer, though against himself, and to his own prejudice, rather than that the truth shall suffer, and wrong shall prevail. I may take the same advantage also, if my witnesses live afar off, or that I would avoid the trouble and charge of examining them, or that my Adversary will confess more to my benefit, than my witnesses will be able to prove. And he that is cast by his own confession, is more powerfully condemned, than he can be by any kind of evidence whatsoever; for that cannot be subject either to mistake or falshood, as other testimony may be.

** Confessio est probatio probata; Neque ulla est probatio illa major. l. 1. Dig. De confess. Vul. rei Juriss. Roman. lib. 2. cap. 2.*

But witnesses are then of use, if he denies what I charge upon him. Who if they be far distant, or through Sicknefs, Imprisonment, or other occasions be not able to come, the Law hath a ready way to relieve me, for I may have a commission to examine them where they live. It were

were too great an oppression that I must lose my right, because my witnesses cannot be brought to the Bar. Inasmuch as if they be travelled into foreign parts, I shall have Letters of Request granted me to the Magistrates of the place where they remain, praying them to examine them upon the matter in issue, and to transmit their testimony; else regularly by the *Civil Law*, they are to be examined in open Court, that it may be seen whether their countenance does not contradict what their tongues declare ^f.

Neither does the *Civil Law* require direct and positive proofs onely, but it will admit of strong and forcible presumptions also, that by arguments of conjecture drawn from one thing to another, brings forth the certainty of the thing in issue.

Par est probationi præsumpcio, quod quidem ad effectum attinet, quia pro probatione habetur, says ^t *Wesenbeck*; Presumptions are equivalent to proofs, and there is the same effect in both. And if a presumptive proof were not as effectual to carry the right, as any other kind of evidence; in vain did *Menochius* bestow his pains, when he made that very long and most elaborate Treatise of that subject onely.

But yet no proof, whether it be presumptive onely, or whether it be direct and evident to the thing it self, is sufficient, except it be made out by the testimony

^f L. 3. Sect. 3.
dig. de Test. &
Gothofred.
ibid.

^t Parat. Dig.
de prob. &
præsump.
num. 14.

mony of two witnesses: for by that Law, *Testimonium unius est testimonium nullius*; one witness and no witness at all is all alike. And so *Constantine* the Emperour hath very emphatically declared in these words: *Manifestè sancimus, ut unius omnino testis responsio non audiat, etiamsi præclara curia honore præfulgeat*^a: We expressly require, that the testimony of one witness be not taken, although he hath the stamp of highest dignity upon him, for it were hard and dangerous, that a man's whole right and interest of what value soever it be, should depend upon the testimony of a single person onely, who, if he be honest and sincere, yet through want of good observation, or by a failing memory, may report the matter of fact otherwise than indeed it was. Yet in matters of small prejudice and value, the *Civil Law* does allow of the testimony of one witness, if the Plaintiff himself can swear the thing in demand is true; for in that case, his averring upon Oath as much as his witness hath sworn, doth supply the testimony of another witness^b.

Howbeit the *Civil Law* hath a farther care yet, for before it will suffer any man's right to be judg'd away from him, it will see not onely a competent number of witnesses, but they must swear of their knowledge too: ^c and it does cast a very considerate eye upon their reputation and quality

^a L. 9. Co. de
est.

^b Mincing.
cent. 1. obs.
68.

^c L. Neque
Natales Co.
de Prob.

quality also. It gives way therefore to the proving of any remarkable exceptions that can be brought against them. *Testium fides*, says Calistratus, *diligenter examinanda est: Ideoque in persona eorum exploranda erunt imprimis conditio cujusque; utrum quis decurio, an plebeius sit; & an honesta & inculpata vita, an verò notatus quis & reprehensibilis; an locuples vel egens sit, ut lucri causa quid facile admittat; vel an inimicus ei sit, adversus quem testimonium fert, vel amicus ei sit pro quo testimonium dat. Nam si careat suspitione testimonium, vel propter personam à qua fertur, quod honesta sit, vel propter causam, quod neque lucri, neque gratia, neque inimicitia causa sit, admit-* ^{2 L. 3. Dig. de Test.} *tendus est.* ² The sincerity of witnesses is strictly to be enquired after. Therefore as to their persons, the condition of every witness must be examined, whether he be a Magistrate, or a common person, whether he be of good and unblamable life, or whether he lie open to just reproof, or hath been any way aspersed; whether he be able or necessitous, so that he may be tempted to transgress for filthy lucre's sake; whether he be an enemy to him against whom he comes to testify, or whether he be gracious with him whose witness he is to be, for if his testimony be void of all suspicion, either in regard of his person, as that he is honest, or in regard of the cause, as that there is neither gain

gain nor affection, nor enmity to corrupt him, he is to be allowed.

Moreover, it leaves a latitude to every Court of Judicature, to give such a time both to Plaintiff and Defendant to prove, as the distance of place from whence the proof is to be brought, does necessarily require. Neither does it exact, that Plaintiff and Defendant should prove within one and the same time, but the Defendant begins to prove his defence, after the Plaintiff's proof is ended^a. When both have done, the Judge is to conclude the cause, by which all farther proof is excluded, so that the next step is to judge and pronounce finally upon the whole matter. And although the *Roman Empire* was the largest and most extended that ever was, and the multitude of causes must be supposed to be great too, yet no Civil cause whatsoever, was to last and continue longer than by the space of three years, nor any criminal matter could be prosecuted against any person, after two years time ended; so that all the proceedings that should follow, and be made after such time ended, were absolutely null and void^b.

^a *Speculat. de Test. sect. qualiter, num. 20.*

^b *L. 13. Co. de Judic.*

Lastly, so carefull it is to preserve and uphold the rights of men, that it does not make any single judgment to be absolutely conclusive and final, if he that is cast, be desirous to bring his cause to be tried again

again by another Tribunal. So much more fitting is it, that the sentence of any Judge should be impeached and overthrown, than that truth should suffer, or any man's right should be injuriously taken away. Within ten days therefore after sentence given, he that is condemned may by appealing to the next superiour Judge, complain thereof; and upon sufficient error assigned, or upon some farther proof made than was before, he may procure the first sentence to be quite reversed, or at least reformed: for the end of an Appeal is, *Ut aut iniquitatem, aut imperitiam Judicis corrigat*; To rectifie either injustice or error.

*c. L. i. Dig.
de appellat.*

These few instances (for they are intended for no more, and thereby to take a conjecture of the rest also) may suffice to shew, that as the safety of the peoples rights, is the general end and intension of the *Civil Law*, so it does dispose and qualifie all its constitutions, and particularly the forms of trial and judicial proceedings to the self same end and purpose, and it does constantly hold and prosecute the same course in other matters. For if the *Civil Law* be rightly understood, it will appear, that they grossly err, who think, that though by the *Civil Law* property is sufficiently enough maintained against common men, yet that the Prince or Sovereign has a looser power given him

d L. 1. dig.
 de Constit.
 Princ. § 6.
 Inst. de Jur.
 Nat. Gent. &
 Civil.
 e L. 31.
 Dig. de Legib.
 Novel. 105.
 c. 2.

him thereby, than other Laws will allow, to command or dispose thereof at pleasure, because it is a rule in that Law, that *Quod Principi placuit legis habet vigorem*^d; What pleases the Prince has the force of a Law: and *Princeps legibus solutus est*^e; A Prince is not tied to Laws. Which being literally understood, and not taken in that fair and moderate sense, which by the course of the whole Law, and by the current of Interpreters it is expounded in, does import, as if Property, Life, Liberty, and all were subject, and did hold of the Prince's will.

But that this cannot be the meaning, is most evident, for that his mere lust or appetite, or every inordinate command that goes forth from him should be a Law, is not to be believed, that the *Civil Law* ever intended. But when the *Roman State* was now changed from being a popular State, and was become an absolute Empire, and that the people had conferred their whole power, that was in themselves before, upon *Augustus Caesar* (in whose time it was that the Royal Law was made) and his successors, it was meant by those words, that the Legislative power should wholly rest in him, without the concurrence of any other, and that thenceforward the Laws should come from him, and be as obsequiously obeyed, as if they came from the whole people;

people; but yet so, that they should not be repugnant to the Laws of Nature, the common dictates of Reason, or mischievous to the publick welfare.

And therefore says ^f *Harprechtus, Verbum placendi, aut Placiti, non voluptatis, non libidinis, non etiam absoluta est voluntatis; sed justitia, rationis & consilii.* The word *Pleases* and *Pleasure*, does not denote Riot, Lust or absolute Will; but Justice, Reason and good consideration: So that though the pleasure of a Sovereign, whilst he publishes any thing for a Law, is binding, and to be obeyed, because a Law can come from none but him, where the nature of the government is such: Yet it must be equal, just, honest and profitable. And what does a Sovereign more in this, than all other sorts of Governours whatsoever, be they more than one, as in an Optimacy; or be the government in the whole people? or what more power is given in this by the *Civil Law*, to an absolute Sovereign, which is not by other Laws given to the supreme and highest Rulers of any Nation?

^e D. sect. 6.
Inst. cod.

^g Harprecht.
Inst. de ver.
div. in princ.
nu. 130.

Again, all Laws in the world do allow those that have the supreme power in them, to take away Liberty by Imprisonment, where there is any publick danger by Freedom, or where it may be a just punishment for contempt and disobedience, and to take away life too for

D capital

capital offences committed: and where publick defence calls for it, to command their very Subjects persons and estates to such a proportion, as the present necessities require; for without this power no community can long endure, nor any peace be preserved. And more than this, nor in any other cases does the *Civil Law* grant a Sovereign licence to touch either property, life or liberty ^b.

^b *Harprecht.*
loc. citat. nu.
95.

And where the *Civil Law* hath declared that a Prince is exempt from Laws, the meaning is not, that he may violate and trample upon them as himself listeth, as oft as they stand in his way, for that is contradicted expressly by divers Texts of the *Civil Law*; ⁱ but that he is not punishable, when he breaks them, because he has no humane superiour to judge or question him, or to exact obedience from him; that in some cases he may give licence to his Subjects not to observe some certain of them, by way of dispensation; that he may grant pardons to some that have transgressed them, where the nature of the fact will bear it; and that he may also quite abolish them when they are grown useless or hurtfull. ^k And under what Law or Government is it, where all these things are not clear without any dispute, and held lawfull, and continually done?

ⁱ *L. 4. co. de*
legib. l. 23.
de Dig. l.
gar. 3.

^k *Harprecht.*
loc. citat. nu.
120.

And

And generally in all instances of the *Civil Law*, as well as in those whereof mention is made before, it may be observed, that the Imperial Law does not only ratifie and confirm the general Laws of Nature and of Nations, but takes care also to reduce all its constitutions that might be any way instrumental to the distribution of justice in particular cases, how remote soever they be from the prime and chief principles, to a perfect conformity with them; and so ought the Law of every State to doe; for that is the true way to make it rational throughout, and to keep it from being contradictory to it self. And that particular Law that makes the least deflections from nature and the common reason of man, and whose Acts and Edicts carry most of that evidence and demonstration along with them (as doubtless some Laws carry more, and others less, as the wisdom of those that made them was greater or lesser) that Law, I say, must needs be the most rational, and thereby the best and perfectest Law of all other.

C H A P. II.

That what Reason teacheth should be made the subject of a Law, is no superfluous, but a profitable thing.

IT is not any hard matter to give the reason why the principles of Right and Justice, and the duties of a civil life, that are already engraven by nature in the heart of man, should notwithstanding be farther declared and made known by a Law. For,

First, though some principles of reason be in themselves so apparent, that they need no illustration, yet there be others more secret, and more remote from the understanding, than that they can be discerned by every mans present conceit, without some deeper discourse and judgment. In which discourse, because there is difficulty, and possibility many ways to err, unless such things were set down by Laws, many would be ignorant of their duties, which now are not; and many that know what they should doe, would nevertheless dissemble it, and to excuse themselves pretend ignorance and simplicity, which now they cannot ^a.

^a *Tamen si nulla perturbati-
one iudices ab
aquitate di-*

noverentur, nihilominus tamen legibus opus est, quibus vel uti lucerna quadam, vel imperiti in densissimis humanarum actionum tenebris dirigantur, vel scelerati metu poenarum terreatur. Bodin. de rep. l. 6. c. 6.

That

That a Ship and Goods cast away at Sea by tempest, if they be driven to Land, shall accrue to the publick Exchequer, and the distressed owners shall not by any claim recover them; some will not believe it to be barbarous and most unnatural; for it is practised by some nations, ^b and defended by divers learned men. And yet a very Heathen by instinct of nature, could cry out, *Ab sit O Jupiter, ut lucrum captemus tale ex hominum infortunio*; Jove forbid that we should draw such lucre from man's distresses: And therefore Constantine the Emperour did by a Law establish the dictate of Nature and Reason, and restored them to the owners, and charged his Exchequer-men not to meddle with them. ^c *Quod enim*, saith he, *jus habet fiscus in aliena calamitate, ut de re tam luctuosa compendium sectetur?* What right can another's calamity bestow upon the publick treasury, that it should reap benefit from a sad disaster?

^b *Sic vivitur, ut qui portus habent, eam crudelitatem in cives, tum in peregrinos exerquantur. Jus quæris? Errorius facit.*
Bod. de rep. l. i. c. 10.

^c *Lib. i. co. de Naufrag.*

Secondly, Falshood doth so seek to cloath it self with the similitude and appearance of truth, that none of the ordinary sort of men, and not all of the best rank neither, can discover or distinguish true and solid reason from that which is false and counterfeit. When therefore our own natural instinct and inbred knowledge bears witness to any thing, and we have the warrant and allowance of the Law for it besides, no

false colours or semblances of reason can deceive us: for what the wisdom and experience of a Nation has agreed and declared to be just and convenient, and our hearts do own and allow to be so, that unquestionably carries it in the greatest evidence and certainty of true and pure reason, that mortal men can attain to in things of humane and civil intercourse.

Thirdly, The Laws of reason, which, man retaining his original integrity, had been sufficient to direct each particular person in all his affairs and duties, are not of themselves sufficient, but do require the access of other Laws, now that man and his offspring are grown thus corrupt and sinfull. And because the greatest part of men are such as prefer their own private good before all things, even that good which is sensual, before whatsoever is most divine: and for that the labour of doing good, together with the pleasure arising from the contrary, doth make men for the most part slower to the one, and proner to the other; therefore unto Laws it hath seemed always needfull to add rewards, which more allure unto good than any hardness deterreth from it; and punishments which may more deter from evil than any sweetness thereto allureth, wherein as the generality and substance is natural, vertue rewar-

rewardable, and vice punishable; so the particular determination of the reward or punishment, and all other circumstances is the proper act of the Law.

Fourthly, when men are rebuked for acting contrary to the Law of Nature, and the Light of Reason, what one amongst them commonly doth not stomach at such contradiction, storm at reproof, and hate such as would reform them. Notwithstanding even they which brook it worst, that men should tell them of their duties, when they are told the same by a Law, think very well and reasonably of it. Because they presume that the Law doth speak with all indifferency; that the Law hath no side-respect to their persons; that the Law is as it were an Oracle proceeded from wisdom and understanding.

Thus we see, that what reason it self prescribeth, may in sundry considerations be expedient to be ratified by a humane Law, and indeed that a humane Law ought in substance to hold forth nothing which Reason allows not of.

C H A P. III.

What is here meant and intended by Reason.

BUT lest there should be any mistake touching the necessary quality of Reason which we so strictly require in a Law, it is but needfull that we should explain what we intend by Reason. For certainly there is not a more deceitfull thing than Reason; it being made use of frequently by false shews and colours to beautifie the foulest and most deformed things, and is grown to be the common gloss that every evil does varnish and deck it self withall: also it is such a faculty, that those that are partakers of it in the meanest measure, do infinitely extoll and admire what they apprehend to be reasonable, though to a right judgment it be nothing so; and what they have not understanding enough to conceive through their own natural weakness, they do as much disdain and condemn, how judicious and solid soever it be. Although therefore the plainer a Law is, and the more obvious to the understanding of those that are to be guided by it, the better and the more commendable that Law must needs be; yet we would
not

not have it thought, that we allow no Law to be good, but what every man that is bound by it, does immediately understand and approve of. For,

We cannot admit that the capacities of common men are sufficient to judge of Laws, which may be rational enough, though the reason of them be not seen to them: yet the main principles of reason are in themselves apparent, and discernible by every eye, and it is not easie to find men ignorant of them; and therefore a Law that is contrary to those common principles is to be abhorred. But besides those that are universally received and agreed on, there are other principles which are not in themselves so evident but are deductions and inferences from the first; and which learned and very understanding men onely are capable by much discourse and reasoning to apprehend. And here besides good natural faculties, and ripeness of years, there must be added the right helps of true Art and Learning; since education and instruction are the means, the one by use, the other by precept, to make our natural faculty of Reason both the better and the sooner able to judge rightly between truth and error, good and evil. Nay, it is not all kind of Learning neither, which will give a man a fitness to discern, whether the Law of a Nation be conformable to
right

right Reason or not; but it must be either all learning and knowledge joined together, or that proper legal knowledge, which is *Ars equi & boni, justi atque in-justi Scientia*, the art of equity and a good Conscience, the knowledge of right and wrong. Farther, the judgment is not yet come to a full degree of perfectness, nor competent enough, except it be fortified with a practical knowledge too, and with a wisdom arising from experience and observation; for he that will undertake to judge whether a Law be agreeable to natural equity and good Reason, he must not take his estimate from the matter of the Law onely, but he must consider divers other circumstances besides. For,

• *Salus populi
suprema Lex
est.*

First. He must see into the Nature, manners and inclinations of the People: for the end of all Law being but to preserve the publick peace, and to keep the people in good order^a, that Law must needs be best and most rational, which does soonest produce that end. And therefore considering that men, even by the very climate they live under, are made to differ so mainly in every thing, Body, Soul, Religion and Manners, from the strange variety of Laws, which we see and reade of throughout the world, we cannot presently conclude any of them to be unreasonable.

A Law

A Law ^b there is mentioned amongst ^b *Aristot. Politic.* the *Gracians*, whereof *Pittacus* is reported to have been the Authour; by which it was agreed, that he which being overcome with drink, did then strike any man, should suffer punishment double as much as if he had done the same being sober. No man could ever have thought this reasonable, ^c that had intended thereby onely to punish the injury committed, according to the gravity of the fact; for who knoweth not that harm advisedly done, is naturally less pardonable, and therefore worthy of sharper punishment? But forasmuch as none did so usually offend this way as men in that case, which they wittingly fell into, even because they would be so much the more freely outrageous; it was for their publick good where such disorder was grown, to frame a positive Law or remedy thereof accordingly. And therefore in that place that was a most rational and a just Law.

A justification whereof we may find in the Roman Law it self; *Nonnunquam evenit*, says *Saturninus*, ^d *ut aliquorum malefactorum supplicia exacerbentur, quoties nimium multis personis grassantibus exemplo opus sit*; It sometimes comes to pass, that some certain offences are the more sharply chastised, when offenders therein grow so numerous, as that it is necessary to make them exemplary; for which severity the Law-

^c *Ebrius si delictum commiserit, clementius est puniendus.*
Menoc. cas. 326. l. 2. de Arbitr. Jud. nu. 1.

^d *L. 26. dig. de pœn. par. 10.*

Law-givers are no-way censurable, but the wicked inclinations of men are to be taxed, which have enforced it from them. Our Saviour himself did excuse *Moses*, for suffering the *Jews* to put away their Wives for lesser causes than for Adultery, because of the hardness of their hearts, though from the beginning it was not so^e, that is, though it was not agreeable to nature, nor to the practice that had always been. It being the lesser evil to dismiss them fairly, than to prosecute them with continual hatred, out of which greater evils might ensue, to which he knew the *Jews* (such was the malignity of their nature) might soon be tempted. Likewise it is not void of reason neither, that the same fault should be punished with greater severity in one State, where the opportunities of committing it are greater, the inclinations of the people more prone to offend therein, and the prejudice thence arising is more considerable than in another where it is not so. *Evenit*, says the same *Saturninus*, ^e*ut eadem scelera in quibusdam provinciis gravius plestantur, ut in Africa messium incensores; in Mysia vitium; ubi metalla sunt, adulteratores monetae*: It happens that the same foul actions are more heavily punished in certain Provinces, as those that set fire on Corn in *Africa*, on Vines in *Mysia*; and corrupters of current Money, where it is of

* *Matth. 19.*

* *D. l. 16.*
par. 9.

of Metal. Neither is it any injustice or cruelty thus to vary: *Non statim debet videri tyrannus, siquid gravius aut remissius publica necessitatis causa in Legibus statuitur; nam sine tali injuria respublica non possunt regi*, says *Comradus Lagus*; ^{8 Method. jur. civ. part. I. c. 4. m. 7.} It ought not to be looked upon as tyranny, if at any time the hand of the Law be sometimes heavier, and sometimes lighter, as public necessities shall command; for without such inequality of measure, Commonwealths cannot be governed. And yet all this while here is no repugnancy to Nature neither; for the general principle of Nature and of Nations, which is to punish offences that are past, and to suppress them for the future is still observed; only it being accommodated to several Nations which are various and differing, it cannot possibly be executed by the same coercion or penalties, nor in one and the same manner.

Secondly, The form and kind of Government must be respected also; for some Laws may be judged very good and fitting for a Monarchy, which cannot be so accounted of in a Government by a few, or by the whole people, or in such a one as is mixed, and made up out of them all.

Thirdly, When a Justice of the Law is doubted, it must be examined, what urgency of affairs there was at that time when

when the Law was made, and whether some necessity and great reason of State did not inforce it. For those that guide the stern do see those lets and difficulties in preserving the whole, which others cannot discern; and therefore it is no marvel if such Laws be enacted sometimes, for which no reason can be rendered, *Non omnium quæ à majoribus constituta sunt, ratio reddi potest*; ^b A reason cannot be given for every thing that our Ancestours have established for a Law.

Fourthly, A Law that may be mischievous to divers particular persons, though otherwise very innocent, must not therefore be presently condemned as unreasonable, so that it be convenient and profitable for the publick welfare.

Jura non in singulas personas, sed generaliter constituuntur, ⁱ Laws are ordained for the generalities sake, and not to provide for each individual person, whose particular interest must suffer, rather than the whole society be brought into jeopardy. A particular mischief is better than a general inconvenience. ^k *Nulla Lex satis commoda est omnibus; id tantum queritur, an pluribus, & in summa an profuit*; No Law is every way beneficial unto all; that one is enquired into; whether it be generally profitable, and to the most.

Fifthly, A national Law that is generally, and in most of its dictates and principles,

^b L. 20. dig. de legib.

ⁱ L. 8. Dig. de legib.

^k Livius l. 4. de bello Macedon. & l. 11. dig. de just. & jur.

ciples, very just and equitable, and universally so acknowledged by the wisest and most judicious men and Nations, is not to be censured for some few particular constitutions, which may seem hard and rigorous, or whereof the Justice, Equity or Reason, is not so evident; for this enterprize of making Laws is the weightiest thing which any man can take upon him. And where a multitude of Laws comes to be made by men (the best of whom are subject unto errors) and for cases of infinite number and wonderfull variety, some few deviations, if any be, may be excused. It may well suffice that the body is fair, and the specks but few.

Sixthly, We can by no means allow of their way of judging, who are ready to measure the goodness of Laws by the corrupt and evil practices of those that are instrumental to administer them. Neither are Laws to be judged such as their execution is. Can a fountain be judged the worse, because it is so unhappy as to run through a foul and slimy chanel? or a chaste Matron traduced, because violence has polluted her? so neither can the Law be justly charged with the exorbitancies of men, which it self condemns, and was purposely made to revenge and punish them; and would doe so too, if violence, power and fraud did not obstruct its course. Se-

Seventhly, We can as little esteem those competent and fitting Judges of a Law, that are so forward to asperse and make it infamous, because by ancient institution it was once ministerial, and attended upon a power and function, which they ever disesteem'd, and have lately seen abolished.

Upon this ground and no other that can be imagined, have divers uttered their bitter and contumelious invectives against the *Roman Civil Law*, having been helpfull in the exercise of the ecclesiastical jurisdiction of this Nation: which because they see eradicated and quite taken away, they judge the other quite useless, and therefore in their conceit ought not to be kept or continued here any longer. In which argument were there any strength of reason, it might be more strongly enforc'd against the *Common Law* it self; the intent and scope whereof, being to set up and maintain an absolute successive Monarchy in this Nation, and to keep the people in a subjection under it; that government being now thrown down, it may be infer'd, that the Law also which did found and support it, should never be made use of more, and that a Law of greater liberty and freedom should be set up in place of it: and so in conclusion, the reason of these disputants would allow us no Law at all.

But

But these must not be ignorant, that the *Civil Law* was originally made least of all for ecclesiastical matters, nor yet for so few cases, as in this Nation it was permitted to deal in: but it was first ordained, to guide the mightiest and vastest Empire that the world hath yet known; and under it the same grew and prospered, to the terrour of its enemies, the joy and comfort of its friends and confederates, and to the astonishment of the whole Earth. Indeed before the first foundations of this Law were laid, the *Romans* did not disdain to fetch their Laws from *Athens*, that City which was once the nurse of reason and flourish in eloquence and brave achievements more than all *Greece*, whence the learned Fathers of the Church sucked literature; *Basil* his eloquence, *Nazianzen* his strength, and others their flowing Oratory; that *Athens*, which who had not seen, is by *Lysippus* accounted a very block. But since this beautifull fabrick of the *Civil Law* was reared up, and came to the perfection we now see it in, it did not only order and compose all matters of publick justice, and of private right in that State, but is since, through the singular treasures of wisdom and purest reason laid up there, propagated also to other Nations, who constantly use it in their Courts, in conjunction with their own

E Laws.

Laws. And in conformity to other Nations did it come to pass, that the use of it was admitted, and brought into ecclesiastical, and other Courts of this Nation, where natural equity and the best reason came to be dispensed, in the doing of right and justice; and especially for commerce with Nations abroad, whereunto that knowledge is most requisite.

Therefore to say that the *Civil Law* is useless, because the ecclesiastical power is thrown out, is as much as if we said, we have no farther need of natural equity or right reason, nor need to treat with foreign Nations any longer, nor now be so wise as we have been, and as other Nations are.

Lastly, Though the wisest of a people have upon mature deliberation agreed upon a Law, and the legislative power of the Nation has enacted it, yet that does not presently conclude the same to be rational: for since the people of other Nations are partakers of the same nature, reason, learning and experience with them, except it can appear rational to others also that are taught and guided by the same principles, it is not to be deemed rational.

And from this single ground onely was it, that the *Roman Civil Law* came to be so universally embraced by other Nations, and to pass so generally for a most rational and just Law, because more natural
and

and common principles of reason, justice and equity were found therein, than in any other Law of man's ordaining; and because we meet with that reason there, that is universal and common to all mankind.

And if there be any certainty of reason in matters of humane discourse, (as we must admit there is, else we shall put out one of the chiefest lights that God has given to the world) it is to be discovered no where sooner, than from that, which not onely one whole Nation has agreed upon and established for a Law amongst themselves, but which other Nations besides them, have allowed for true reason, and practised the same also within their severall territories for many hundreds of years together; for the most certain token of evident reason is, if the general persuasion of all men do so account it, and when the judgments of all men generally, or for the most part, run one and the same way.

Non potest error contingere, ubi omnes idem opinantur; & quicquid in omnibus individuis unius speciei communiter inest, id causam communem habeat oportet, quæ est eorum individuum species & natura. No error is to be feared in such matters where all men are of the same opinion; and what is ingrafted in every individual of the same species, must necessarily proceed from one common cause, which is nothing but their very

nature. The general and perpetual voice of men, is as the sentence of God himself; for that which all men at all times learned, Nature her self must needs have taught; and God being the authour of Nature, her voice is but his instrument: by her from him we receive, whatsoever in such sort we learn.

When therefore we say, that the Law of a Nation ought to be conformable to Reason, we mean and intend such Reason as other Nations and men do generally by the instinct of Nature, the means of good literature, and their insight in civil affairs, understand and agree to be reason in such matters. *Non enim licet naturale universaleque hominum iudicium falsum vaneque existimare:* It is not fitting to question that which is generally allowed by all men. And that Law that approaches and comes nearest to such common and universal reason, is the truest and perfectest Law of all other, and makes the people most happy and quiet that live under it.

Howbeit, since this is a blessing that every Nation does not enjoy, froward and perverse men must not take an occasion from hence, to despise and quarrel with their own Laws, upon pretence that they are irrational. *Cognitio de bono & malo non pertinet ad singulos: omne iudicium in civitate est illius qui gladium belli & gladium*

gladium justitia gerit. Regula boni & mali, justi & injusti, honesti & inhonesti, sunt leges civiles; ideoque quod Legislator praeceperit, id pro bono, quod vetuerit, id pro malo habendum est. To judge what is good, and what is evil in a common society, belongs not to any, that are under rule; but to him or them solely, in whom the supreme power resteth: The measures of good and evil, just and unjust, honest and dishonest, are singly the Laws of every State. Therefore what the Law-giver does prescribe with subjects, must pass for good; and what he forbids, they must look upon as evil, till he thinks fitting to order and declare otherwise: In so much as neither the Judges nor Magistrates themselves can dispute or judge thereof. *In temporalibus legibus, quanquam de his homines judicent, cum eas instituunt; tamen cum fuerint instituta & firmata, non licebit judici de ipsis judicare, sed secundum ipsas,* says St. Augustine, as he is cited by the Canon Law¹: In temporal Laws,¹ *Cap. 3.* though they may be debated by any man *Dist. 4.* whilst they are in making, yet when they are once agreed on, and fully passed, the Judge shall judge by them, but of them he ought not to judge.

In pressing then that a Law ought to be agreeable to right reason, the argument is directed to the Law-giver, not to the Subject; and the scope of it is to

shew, rather what a Law ought to be, than to quarrel with any particular Law, because it is not so rational as it should be, and as other Laws are. But withall, it professedly aims to discover the strange weakness of those, that when other Nations hold fast the *Roman Civil Law*, as being the sum and substance of all humane reason, they are willing to forgoe it quite, when they have had the conjunction and assistance thereof so long in this Nation, and may with so much ease and advantage keep it still. To whom I shall give no other caution, than what *Ulpian*, one of the grave sages of the *Civil Law* gives; *In rebus novis constituendis evidens esse utilitas debet, ut recedatur ab eo jure quod diu aquum visum est*: Amongst other alterations, saith he, that is, be it Government or whatever else, that comes to be altered in a State, yet it ought to be some apparent advantage that should induce a Nation to part with that Law that has by long use been found to be very equal.

in L. 2. Dig. de constit. princ.

CHAP.

C H A P. IV.

That Reason is not so strictly required in the Law that orders the affairs of State, as in that that settles the differences that arise between Man and Man.

IF then we would know, when reason ought to manifest it self in a Law, and when it is not so strictly required, but that some deviation may be permitted, we must observe a wide difference between the publick affairs of a State, and those of the Subjects own in their private dealings and controversies with one another; for although all the affairs of a Nation both publick and private, must be under the provision and rule of the Law, yet is it not necessary, that they should not both be regulated in one and the same manner, nor by one and the same reason, for there is a reason of State, as well as a reason of Nature.

In the Laws for publick matters, because they respect the welfare and preservation of the whole society merely, and so are not to be tied to the same rules every where, a strict adherence to natural equity and common reason is not required: Safety and convenience is rea-

son enough to justifie them; so they encourage Vertue, punish Vice, maintain Trade and industry, and uphold Religion. Yet it is the happiest, when there is the least aberration from common equity and known reason, even in those things wherein the whole Commonwealth is principally concerned.

But it is to be considered, that there are such multitudes of people, such difference of degrees, qualities and conditions, and such perversity of will, humours and affections in every Commonwealth, that no humane wit is able by sweet equitable ways, to reduce them to that perfect temperature and harmony, which is requisite for the conservation of civil unity. This may partly be judged by the government of a Family, be it great or little, which is many times turn'd upside down, and dissolved by the perverse humour of some one or two, not corrigible by any wholesome counsel, or moderate chastisement of the head of it. What marvel is it then, if in whole Kingdoms and Commonwealths, amongst so many thousands of different persons, and of different humours, there are many so exorbitant and turbulent, that no wit nor power of man can be able fairly to tame or temper them?

The Laws therefore must be fitted to all such publick accidents, providing sharp
reme-

remedies for diseases that are acute and desperate: neither must they tender the private right or safety of a few, if their detriment or mischief may secure the whole. In these cases, *Legum convenientiam & aptitudinem semper expetimus, non semper aequitatem*: The extremities of a Nation must be provided for by fitting and convenient means, though the exactness of right and justice seems to be infringed: for herein the Commonwealth is like unto a Ship in a storm at Sea, where the Master may cast over-board what private man's goods he will, to lighten the Ship, and to preserve the whole: So where an enemy with an hostile intent is coming against a great City, the City may demolish or set on fire the Suburbs, rather than permit the enemy to harbour there, thereby to annoy and endanger the whole City. The like must the establishments of Law be, that are directed to a publick end, they must aim to procure the common welfare, without any respect to private right, or imaginary reasons.

But in such Laws as are purposely made to defend every man's private interest, and to pacifie contentions and quarrels arising thereupon, and where the publick is not concerned, it not onely may but ought to be otherwise. They must hold forth nature, equity, reason and a sound

• *Tit. de Just.*
 & *Jur. nu.*
 14.

found judgment, so as to command every judicious man's assent and approbation; and even they that are cast may not complain, murmur or dispute the same. And in the same manner has *Wesfenbeck* in his *Paratitles* upon the *Digests*,^a differenced these two sorts of Laws: *Jus privatum*, saith he, *quia in reddendo cuique quod suum est, versatur, ed ad normam equalitatis & justitie congruat oportet: sed jus publicum non totum ad normam equitatis vel equalitatis, ut jura privatorum, sed ad id quod rei publice est opportunum, precipue aptatur.* The Law that is made for the use of each Subject against another, because the office of it is, to give to every one his own, it must measure it out by the precise rule of equality and justice. But the Law that is made to order the general welfare of the whole State, is not tied to any such rule of equity, but is such as the advantages and exigencies of State require.

In all private affairs therefore that happen between party and party, wherein there is no mixture of State-interest at all, and which come to be determined by a Law, we require that the rules by which such controversies are appointed to be decided, have not in circumstances (for they may be arbitrary, and according to mere will) but in substance so sure a ground in reason and common equity for the most part, as either to be consonant

to the dictates of Nature, or obvious to vulgar understandings, or at least discernible by the wisest and most judicious of men, acquainted with the principles of Law, and the rules of right and justice. Neither is it the bare reason of the wisest, if it be such as is floating in the brain onely, that will here suffice; but it must be committed to writing, and have such an authority to own it, as is authentic and current amongst the greatest and best disciplined Nations also, which kind of reason thus authorized, especially in any ample measure, is to be looked for^b and found onely in the *Civil Law*^b.

^b *Ratio naturalis secundum hominum*

capitum quandoque variat, & multi non tam ratione illa quam phantasia aguntur. Leges autem latae à sapientissimis viris, & judicio omnis seculi approbatae, certè eam rationem tenent. Alb. Gentil. *de ju. bel. lib. 1. c. 1.*

CHAP.

CHAP. V.

That the customs of a Nation ought in like manner to agree with Reason.

AND here I am not unmindfull, that besides written Laws and constitutions, there are belonging to every Nation, customs and usages unwritten, which have as great an overruling power upon the persons and rights of the people, after they have been generally allowed, and that their observation hath been constant and uninterrupted for a long time together: And therefore says *Modestinus*,
• L. 40. Dig. • Omne ius aut consensus fecit, aut necessitas constituit, aut firmavit consuetudo: All Law proceeds either from consent, necessity or custome. Neither is it rare but common to find in every Nation such usages as do intermix themselves with the acts of justice, and the rights of the people, and yet they have by long continuance so worn out their original, that no rational account can be given of them, nor no ground in reason rendred by those that use them; and yet they will not stick to sacrifice their most pretious enjoyments to preserve them, nor will admit them, upon any pretence of greater advantages whatsoever.

The

The reason hereof lies in the affection which the people are apt to bear towards that of which themselves are the authours, customes being first brought in and consented to by them: but Laws are imposed on them by their Princes, whether they will or no. *Consuetudines*, says ^b *A-* ^b *Reverendissimus* Robertus, *subditis neque graves sunt neque odiosa, sed leges istae municipibus videri solent supra ceteras omnes acceptissima, cum tolerabilius sit consuetudinis vinculo, quam legum necessitate astringi. Quam dulce, quam gratum est voluntaria subjici necessitati, & illo juris vinculo astringi, cujus cum authores simus, puderet iniquitatem aut severitatem accusare? At regia edicta non ratio sed sola dominantis voluntas, justa sit an injusta, sancit & moderatur*: Customes are neither burthenfome nor unpleasing to the people, but above all other kinds of Law seem most acceptable, since it is more tolerable to be tied to custome, than to an imposed Law. How sweet and pleasing is it to be subject to a necessity of ones own making, and to be bound by such a Law, which when we have made our selves, we cannot for shame complain, that it is either unjust or rigorous? But the edicts of Princes flow not from reason, but from mere will, without respect either to right or wrong.

Besides, though the reason of some customes be not now discerned, yet it cannot be

be supposed but when they were first admitted by the people, they tended to their common good. For, *Quoties de jure populi agitur apud populum, cui mutare, cui abrogare, cui ferre quas velit leges, accipere quas velit rogationes liceat, nunquam se ipse diminuet*; They will never prejudice their own rights by any custome or Law which themselves establish, says *Quintilian*.^c Howbeit, it is no more essential to a Law than it is to custome, to be reasonable when it is first ordained.^d *Rei*

^c Declam.
254.

^d L. 1. & 2.
co. *Qua sit
longa consuet.*

^e Lib. 3. de
Baptismo con-
tra Donati-
stas, cited in
the Canon-
law. Dist. 8.
c. 4.

non bona consuetudo pessima est: Nemo consuetudinem rationi & veritati praeponat; quin consuetudinem ratio & veritas semper excludit, says St. *Augustine*^e. Let no man prefer custome before either truth or reason, because truth and reason does drive contrary custome quite away. So that both in a Law and a custome also, it is equally requisite that they should both be rational.

C H A P. VI.

*Where Law or Custome is wanting,
to judge by Precedent or Example,
has no defence in Reason.*

AND since right reason is so essential to that which comes to arbitrate and judge of our lives, livelihoods and interests, we must crave leave to disallow of their opinion and practice, who when they have neither Law nor custome of their own countrey, to guide their judgments by in any case that comes before them, do not resort to the *Civil Law*, as other Nations commonly do, but do usually supply that defect by precedents, thinking that any case which the Law has not provided in, may be judged by a judgment had in the like case before; which certainly cannot be defended by any right reason, or good judgment. * For,

* *Si dixerit
aliquis, sic vi-*

di, sic audiui; en decisiones; magis risum quam fidem nostram excitat. Mæstert. Dissertat. de Artific. disput. parag. 9.

First, The conformity of one sentence to another, to rational and wise men argues nothing as to right or equity, but concludes a concurrency in opinion onely, both which may be erroneous and mistaken.

Se-

Secondly, As in judged cases, taken merely as such, there is want of reason to persuade, so there is want of authority also to oblige; for what force or power can the judgments or sentences of any predecessours have to bind or limit those that shall succeed them in the same judicatory? *Par in parem non habet imperium, nec aliquis in seipsum*; Judges of equal power cannot exercise any rule over one another, nor indeed can any one tie up ones own self. ^b And therefore as it happens often, that *de eadem re saepe alius aliud decreverit aut judicaverit*; upon the same fact one Judge judges one way, and another another: So it is to be seen too, that *illi aliàs aliud iisdem de rebus & sentiunt & judicant*, the very same men do determine the same fact at divers times diversly; says *Erodian* ^c. For indeed the judgments of men may wax perfecter by age, study and experience, than they were when they gave their first judgment: And those that do succeed, may be by many degrees more eminent in wisdom, reason, knowledge and experience, than those that sate in the same Tribunals before them; for there is in this world an undoubted wheeling in all things; knowledge, wit and understanding does not shine and prosper so in some times, as in other succeeding times they do; and time to posterity may discover that to be an error;

^b L. 13. *pag. 4. Dig. ad S. C. Trebel. and Gothofr. ibid.*

^c *Rer. Judic. lib. 1. Tit. 1. c. 18. &c. 26.*

errour, which our ancestours thought a truth.

Thirdly, There must needs be little value and weight laid upon foregoing judgments, even of the highest and most exemplary tribunals of men; nor can they be esteemed such fit patterns for our imitation, when it is considered what uncertainties they lie under, what failings they are subject to, and what artifices, subtilties, inventions, practices and other undue means are too too frequently used to corrupt and poyson them. For,

Sometimes *pars major vincit meliorem*; the greater part weighs down the better. Where many Judges are to pronounce judgment, and some one or two of them be eminently qualified above all the rest; that which the greater number concurs in onely, must prevail and take effect; but if the wisest be dissenters, *numero potius quam scientia judicatur*; there is more of number than of weight or knowledge in such a sentence.

Sometimes he, in whose favour sentence is given, carries it but by one vote more than he against whom it passeth.

Sometimes some one of the Judges being more renowned, or haply more eloquent than his fellows, does either through his greatness, speech, dexterity or wit, draw all the rest into errour by his too powerfull interposing.

F

But

But the danger of passing wrong and erroneous judgment is greater, where the office and power of judging rests in one single person onely, since it is easier to draw away and overcome one than many. And although it is his office to set before his eyes law, religion, equity and truth and remove far from him arbitrary and licentious will, love, hatred, envy, fear, indulgence, covetousness, and all inordinate affections whatsoever; yet here too, says Quintilian, *Pecunia quoque persuadet, & gratia, & autoritas dicentis, & dignitas & postremò aspectus etiam ipse sine voce, quo vel recordatio meritorum cujusque, vel facies aliqua miserabilis, vel forma pulchritudo sententiam dictat*; Money does prevail, and favour, and the graciousness of the suppliant, and greatness does draw away, and sometimes even the very presence without any speaking, either through the remembrance of some eminent deservings, or through the countenance being either mournfull or sad, to pity or to admiration beautifull, is a means to melt a Judge, and to corrupt and infect the sentence.

It is too common also, that the wrong cause is followed with exactest diligence, strengthened with the patronage of the most and the best advocates, and some of them haply too nearly related to the Judge himself, and assisted with all other advantages, that can make victory hopefull,

full, when right is destitute of all assistance, and but weakly and faintly defended: the one side too bold and pressing, the other too too modest and bashful, shewing a kind of guilt in blushes. It is not so rare neither as were to be wished, that the Regal or other supreme power does intermeddle in the very acts of justice, either directly, or by some remoter influence; especially when a Nation is embroiled in troubles, and divided into divers parties; for in such case justice is made subservient and ministerial to the strongest and most prevailing faction.

These are the difficulties and temptations which all Courts of justice have to contend withall, under which they may more easily fall, than withstand and vanquish them. The judgments therefore and sentences which they deliver, though we must acquiesce in and sit down by them, as to such cases which the same are purposely given for to decide, and as to such persons that are mentioned or concerned therein (for else there would be no end of controversies, nor no man's right would be ever certain; and therefore the *Civil Law* says, that *Prator quoque jus reddere dicitur, etiam cum iniquè decernit*, ^d and *Res judicata pro veritate accipitur*; ^e a Judge

^d L. 1. §. 1. de
just. et
^e L. 1. §. 1. de
de reg. jur.

is said to minister right, even when he decrees unjust things, and a sentence is taken; and stands for truth;) yet there is

nothing either of equity or reason to make them so authoritative and powerfull, as that they should be drawn into example for the future, and be made patterns to determine other, though never so like cases, by; since the ways and means of obtaining them may not be fair, and their integrity and soundness be questionable.

Fourthly, Whereas similitude and likeness of cases is the onely reason to persuade the walking by the light of such judgments as have been before pronounced upon facts that are supposed to have had the same circumstances; *Quintilian*^f says very truly, *Vix ulla est causa per omnia alteri similis*, there is scarce any cause that suits or agrees with another in all circumstances: and again ^g he says, *Tot seculis nulla reperta est causa, quæ est tota alteri similis*, In so many ages, and in such a multitude of cases that have occur'd, there has not been found one wholly like another; for indeed the dissimilitude and deformity that is amongst our selves and the whole off-spring of man, not in outward form, visage, lineaments, or stature onely, but even in our natures, tempers, inclinations and humours also, makes all the matters we deal in, and the actions that flow from us, disagreeing too. Also in the other productions of nature, and the accidents that are commonly ascribed

^f *Instit. l. 5.*
^g *c. 2.*

^g *Lib. 7. in*
præfat.

ascribed to chance and fortune, there is such a strange and wonderfull variety, that nothing is acted, produced or happens like another, but that there is some circumstance or other that does diversifie it and make it differ.

When therefore cases are either wholly divers and differing, though in never so small a circumstance, their determinations cannot be the same^h; for diversity of fact must needs beget a diversity of Law too; and a very small circumstance will change and alter the state of any business, and require clean another judgment than can be had from cases that do not exactly parallel them in all things.

And this has made all Lawyers to agree, that, *argumentum ductum à simili est multum fragile & infirmum; nec procedit, quando datur dissimilitudo etiam parva*ⁱ; An argument drawn from a like case is very weak and impotent, and falls to the ground when the least dissimilitude is found.

Fifthly, Since before former precedents can be made fitting rules to decide and judge other cases by, it is absolutely necessary that the cases should agree punctually in all such circumstances as were the prime efficient cause of such final and definitive judgment: how shall this concordance be made evident and certain? for it must either depend upon the memory and truth

^h *Res per se ipsa valde perniciofa est, exemplis non legibus judicare, cum ex levissima personarum, vel locorum, vel temporum varietate iudicia mutantur.* Bodin. de rep. l. 6. c. 6.
ⁱ *Everard. Topi. loc. à simili. nu. 12.*

of a reporter and the Judge together, or else upon the safe keeping of all that was alledged and proved in the case in some Registry or Office, and the exact search and perusal of all upon occasion; neither of which is authentical and sure enough, whereby to judge and condemn another man: for either the report may be very easily mistaken, or some leading circumstance may slip out of the Judges remembrance, or some of the Records be lost or mislay'd, so that a part of the case whereupon the Judgment passed, may be wanting, and not rightly known.

Upon these and such like considerations is it, that the *Civil Law*, does so frequently express it self in disallowance of judging by precedent or example, and directs Judges to reflect onely upon that which truth and the Law will bear, and not upon any thing that has been done by others. *Licet is qui provinciae praest, omnium Roma magistratum vice & officio fungi debeat, non tamen spectandum est quid Roma factum est, quam quid fieri debeat*, says *Pro-*

2. 12. Dig. culus^k. Though the provincial and inferior Magistrate does exercise the same power and office that the Magistrates do in Rome, yet he must not look so much at what they doe in Rome, though the chief and head City, as what indeed and in right they ought to doe.

Justinian also did by an expresse constitution made in his time, command all the Judges to persue strictly truth, justice and the Laws; and not in judging to take their example from the most solemn sentences of the highest and most eminent Judges in the whole Empire; no nor to follow such resolutions as himself should make to emergent doubts propounded unto him, if he had otherwise decided them than they ought to be: *Non enim, faith he, si quid non bene derimatur, hoc & in aliorum iudicum vitium extendi oportet, cum non exemplis, sed legibus iudicandum sit.*

For if a case has been once determined amiss, this should not spread to the corrupting of other Judges, since we ought to judge by the Laws and not by example.

¹ L. 13. Co. de sent. & inter lornn. jud.

And therefore *Gordian* the Emperour makes it a strange and an unwonted thing in *Rome*, that judgments had between other parties, should either profit or prejudice those who were neither present then in Court, nor ever called. *Res inter*

alios iudicata, faith he, *neque emolumentum asserre his qui iudicio non interfuerunt, neque prejudicium solent irrogare*^m. Which holds

not onely in civil matters, but as to pre-

judice reaches to criminal also: *juris manifestissimi*, say *Dioclesian* and *Maximinian*

Emperours, *& in accusationibus, his qui congressi in iudicio non sunt, officere non posse*, Eod.

^m L. 2. Co. Quibus res iudic. non. noc.

ⁿ L. 3. Co.

siquid forte prejudicii videatur oblatum. There is nothing more manifest in Law, than that in criminal prosecutions, a condemnation had can do no manner of hurt, or hindrance to him that was not accused.

I therefore say, as to prejudice, because when life or honour is in jeopardy by a criminous impeachment, the Law is so carefull to preserve the same, that the acquittal of one offender is an acquittal of the other also, the Law being more prone to absolve, than to condemn, and so *Ulpian* answered in the case of adultery:

° L. 17. Pa-
rag. 6. dig. ad
l. Jul. de A-
dylter.

° *Expectabit mulier*, says he, *sententiam de adultero latam; Si absolutus fuerit, mulier per eum vincet, nec ultra accusari potest;*

Let the Woman wait the doom of the Man, if he be quitted, she is thereby free and can never be accused; but if he be cast, that does not cast her, but she shall defend her self notwithstanding. And the reason that is assigned is observable. *Quid enim si adulter inimicis oppressus est, vel falsis argumentis testibusque subornatis apud praesidem gravatus, qui aut noluit aut non potuit provocare?* *Mulier vero judicem religiosum sortita, pudicitiam suam defendet.* Possibly he might be oppressed with malice, or condemned by false witnesses, or the judge might be carried away with smooth words, or mere outward shews: The Woman coming under a better and more upright Judge, may vindicate

vindicate

vindicate her chastity, and clear her innocence better. Neither will any likeness of one case to another, involve an absent person in such accidents as have fallen upon other men; for *nec in simili negotio res inter alios actas absenti præjudicare, sæpe constitutum est*, says the Law^p: It has been frequently over-ruled, that though the cases are never so much the same, yet a third person that never was a party, shall sustain no detriment by what hath been done between those that were. For besides divers Laws that are set under other Titles, there is a whole title to the same effect^q.

^p L. 4. Co. Quibus res judic.

^q Co. Res inter alios judic. aliis non nocere.

Neither does the Law look upon it as any incongruous or strange thing, that the same business should be judged diversly, for it does instance where it does frequently come to pass. *Circa inofficiosi querelam*, says *Paulus*, *evenire plerumque assolet, ut in una atque eadem causa diversa sententia proferantur*. And the same says *Papinian*^r; *Filius qui de inofficiosi actione adversus duos heredes expertus, diversas sententias judicium tulit, & unum vicit, ab altero superatus est*; in an action that is brought against the Will made by a Father to the disinheriting of his own children, it is usual to have contrary sentences pronounced, the Son to vanquish one Executor, and to be overthrown by another.

^r L. 24. dig. de inoffic. Testam.

And

† *Gail. obs.*
lib. 1. obs. 70.
nu. 17.

* *Consil. 59.*

† *Consil. 180.*
num. 51.

And therefore the practicans allow not any such plea in the Court, as to say, that the case hath been judg'd, except there be a concurrence of all these three things together; to wit, that the cause and process be the same, the right of action the same, and the persons the same too^f; so that though the *causa agendi*, the ground of suit were the same in all things, yet if the same persons never had any such suit depending, but that there is a new person in judgment which never appeared before, the proceeding must now be made wholly upon a new stock, without considering how and in what manner the right has been judg'd before between other persons. Neither is it material, whether the Judge that is to give the present judgment, be the same that judg'd the like case before, or whether they be divers; for the Law is still the same in both, *Menochius* resolves the one case, † *Diversa sententia*, saith he, *à diversis iudicibus, inter diversas personas, diversis temporibus, ex una eademque facti specie fieri possunt*: Upon one and the same fact, contrary sentences may be given by several Judges, between other persons, at several times; and again, † *Non aequissimi iudicis est facere quod ab aliis fuit factum, sed quod fieri ab illis debuit, sequi*. It is not the part of a just Judge to judge as others have done, but as they and all ought to doe.

doe. As to the other, *Christinaus*, notwithstanding the great pains he has taken to gather together as many judgments and decisions of the great council of *Machlyn* in the Empire, as to take up six volumes, yet he does not stick to say^x, that ^{x Vol. 1. de-}
Senatus non ligatur suis anterioribus sententiis, cif. 2.
quin valeat postea contrarium judicare. The Senate was not tied to former judgments, but that they might judge the quite contrary afterwards; for he accounts it praiseworthy, to relinquish an error, and to embrace a truth at any time: nor to be possible, but that the change of times should introduce change of opinions and judgments also, and shews that *Afflictis* in his time saw that judg'd one way, which *Grammaticus* afterwards reports to have been judg'd the contrary^y. Thus then, ^{y Ac propterea curia Parisiana in sententiis sapius hac verba subjecit; Neu judicata res ad consequentia trahatur. Bodin. de rep. l. 6. c. 6.}
since we require that reason and natural equity should be strong and vigorous both in Law and custome, or at least no means repugnant to them, when they come to judge us; and that we see all manner of reason to stand against judging by precedents or foregoing judgments; besides the universal Law and practice of Nations, we conclude that the way of judging by precedents, is as erroneous a guide to walk by, and as little satisfactory to the people, as a Law or custome that is void of all equity and reason, and therefore by no means to be entertained or admitted.

And

And yet we must allow what Callistrus reports from the Emperour ² Severus;
² L. 38. Dig. *de Legib.* *tus* reports from the Emperour ² Severus;

That *rerum perpetuo similiter judicatarum autoritas vim legis obtinet*: Cases constantly judg'd one way for a long tract of time together, do set a rule to such as shall succeed: for as Cujacius likens it to custome, ² *Consuetudo*, saith he, *non valet nisi ex tempore longo, usque frequenti*. Ita *rerum judicatarum argumentum non valet, nisi ex tempore longo sive diuturno frequentique, iudicioque simili*: As custome is of no force, except it endures a long time, and is frequently put in ure: So to argue from foregoing judgments, is no weighty argument, except they have been many, and constantly the same for a long time together. In like manner, it is most true, that *Optima legum & consuetudinis interpret est res perpetuo similiter iudicata*, The judg-

² L. 7. Dig. *de just. & ju.*

ing of the same thing always in one and the same manner, is the best help to understand both Law and custome by: But then it must be, saith Cujacius, *Non quolibet iudicium, sed quod numero & tempore valet*; as if he had said, it must not be once, twice or thrice judged so, but the judgments must be many, as well as alike; and it must hold on so for a long time together, before it can have the force and effect of a Law, and after it has so long prevailed, it may be esteemed not so much Law, as reason; for certainly

tainly it could not have so long endured, if the reason of it had not been evident to those, whose judgments were so conformable as never to disagree therein.

C H A P. VII.

That they are great advantages which a Nation has by ruling by such a Law as is rational.

THE governing and judging by that Law which reason teacheth us, cannot but be effectual unto that Nation's great good that observes the same; for we see the whole world and each part thereof so compacted, that as long as each thing performeth onely that work which is natural unto it, it thereby preserveth both other things, and also it self. Contrariwise let any principal thing, as the Sun, the Moon, any one of the Heavens or Elements, but once cease, or fail, or swerve, and who doth not easily conceive that the sequel thereof would be ruine both to it self, and whatsoever dependeth on it?

As therefore the obedience of other creatures unto the Law of Nature is the stay of the whole World, so nothing is
more

more effectual to the upholding of any communion amongst men, than to command the peoples obedience to nothing more than what nature and reason prompts them to, and to determine their rights by rules, which themselves cannot gainsay; for when the judgments of a people are satisfied in the reason and justice of that which is commanded, either by their own understandings, or as they are taught by more knowing men; they sit down in a quiet and contented submission, and looking upon their Governours with the greatest reverence and honour, they obey without complaining, and thereby the publick peace is also secured.

But when the Laws of a Nation, that should be most clear and rational, are wrapt in a strange language, delivered in terms most intricate, and the matter thereof not intelligible by any degree of true reason and learning; the people are presently possess'd with a jealousy, that their dearest rights and most precious interests may miscarry under them, and their surest possessions snatcht from them, under pretence of a Law which they cannot discern any justice or reason in; till at last they fall into open rage and distemper, thereby disturbing the publick peace, and oft-times shaking the very Government it self in their fury: for there is no bondage like to the slavery of the judgment,

• *Legum ac Magistratum contemptum sequuntur populi seditiosae voces, & adversus principes ipsos conjurationes ac defectiones.*
Bodin. de rep. l. 3. c. 1.

ment, and the captivity of the will; neither is there any greater occasion or ground of fear, than when a man is constrained to tread such steps, where his understanding cannot guide him. But especially for ones fortune or personal safety to be exposed to danger in such unknown and undiscernible ways, it must needs draw on a greater distemper in the mind, because of the great consequence thereon depending. Moreover, when the dictates and proceedings of Law are rational, we are much assisted by our reason in a conformity and obedience to them, even when we do not exactly know the Law it self; and we do not so soon slip into danger or mischief under it, when we have an inward guide to direct us in the way we are to walk in: but when we are to walk in a path we know not in any kind, and to observe rules which we cannot understand, it is then that we wander out of one labyrinth into another, till mischief and the penalty of the Law surpriseth us unawares.

Besides, Laws that carry in them honest, rational and clear principles, are as so many lessons for the people to fashion their lives and actions by, whose nature and manners will be much tempered by the discipline of the Law they live under; for since it is the onely guard and security that they have for their lives and fortunes,
they

they will be studious in it, inquisitive after it, and attentive to it; and so whilst they study and learn the Law, to keep themselves and their estates in safety, at the same time they also learn all the duties of a moral life, and suck in the truest principles of practical integrity, and civil conversation. And this amongst many others, hath been one very powerfull inducement to Christian Nations, to receive and cherish the use of the *Civil Law* so much as they do, because no humane Law or Learning does so well teach men to be just, vertuous and innocent in all the actions of this life, as that Law doth. *Iustitiam colimus, & boni & aequi notitiam profitemur; aequum de iniquo separantes, licitum ab illicito discernentes, bonos non solum metu poenarum verum etiam premiorum quoque exhortatione efficere cupientes; veram, nisi fallor, philosophiam non simulatam affectantes*, says *Ulpian*^b, in the name of all the Lawyers. We adore justice, and the knowledge of right and equity is our profession; dividing equity from what is unequal; discerning lawfull things from unlawfull; aiming to make men vertuous, as well by rewarding them where they doe well, as punishing them when they doe ill; teaching such wisdom, if I mistake not, saith he, as is not for shew and ostentation, but is true, solid and substantial: For *Cujacius* explaining the last words of that

^b L. 1. Dig. de just. & jur.

that Law, makes it the proper office of a Lawyer, to teach men to bridle their lusts and appetites, to study the common good, to defend their own, to keep their desires, hands and eyes from the goods of others; which are but the lessons of a true Philosopher.

Likewise the sum and substance of all that a man owes morally either to himself or others, is comprised in the three general precepts of the *Civil Law*: *Honestè vivere; alterum non ledere; sumum cuique tribuere*^c; To live soberly, not to hurt another, to give every one his own. The first duty concerns our own selves, and is the fruit of modesty, forbidding us to doe any thing whereby we may seem lewd or vicious; nor to shew any kind of dissoluteness either in our speech, habit or manners, and to refrain from any act, *quod vel nos commaculet solos*, says^d *Cujacius*, that is, which may stain our persons, though none be privy to it but our selves. The other two are the proper effects of temperance and justice, and owing to others, whom we are to live, converse and deal with; teaching us to abstain from theft, violence, rapine and injury; to render back to all men what we have of theirs; or do owe them; reward to virtuous actions, and to evil punishment; and to make full satisfaction for damage or detriment done to others through our

G means:

^c L. 10. Dig.
de Just. &
Jur. Parag. 1.

^d D. l. 10.

* L. 2. Dig.
de Orig. Jur.

means. Again, though Laws very rarely continue, when the state of Government comes to be quite changed; as it fell out in the *Roman* state at first, long before the time of the *Civil Law*: where ^c *Pomponius* writes, that *Exactis Regibus, omnes leges Regiæ exoleverunt, iterumque cœpit Populus Romanus incerto magis jure & consuetudine aliqua uti, quam perlata lege, idque prope viginti annis passus est*: Kings being driven out of the Empire, their Laws presently ceased, and the people of *Rome* did again begin to be governed, partly by arbitrary discretion, and partly by custome, rather than by any written Law, and so continued for twenty years together: And so it comes to pass, that new Laws are always prepared to suit with a new Government. Yet upon no change whatsoever, are mere rational Laws repealed, or grow out of use.

The reason hereof is because men can never lose their nature, forgo their understanding, or quit their reason. Neither can a supposition be admitted, that such Laws as these can be unsuitable to any Government; for what kind of Government hath been hitherto devised by man, or established in any Nation, with the which, natural equity, or the dictates of right reason has not suited? Nay, it should be rather concluded, there may be a tyranny, but there can be no government without them.

Here.

Hereupon it has been, that no change that ever happened in the *Roman* state, no nor the overthrow of the State it self, could take away the force or use of the *Roman Civil Law*, but that other Nations have assumed it into their territories, and have made it serviceable to their occasions and ways of governing, how various and differing soever those occasions and kinds of government have been.

Farthermore, though Laws with all other worldly things besides, have their times to wax old, and as it were decrepit in, according to that of *Claudian*.

*Firmatur senium juris, priscamq; resumunt
Canicem leges, emendanturque vetusta,
Acceduntque nova —————.*

Yet those Laws that are inspired by nature, reason and pure equity, can never in any time, in all places at once lose their esteem or use. These are the Laws that carry a clause of perpetuity with them, they were first born with man, and can never die before him. It might well be reckoned amongst the wonders of the world, that the *Civil Law* made so many hundred years ago, and which has seen the spoil and overthrow of *Rome* it self, and many other States and Empires besides, should still flourish in the *European* Nations, as if it were but new sprung

up; but that surely the eminent wisdom and known reason that is in it, hath given that Law a life as lasting as the world it self.

It hath been observed of all arts and sciences, that there is a kind of circular progress in them: they have their birth, their growth, their flourishing, their failing, their fading, and within a while after, their resurrection and re-flourishing again. And

* 1. De cælo.
† 1. Meteor.

Aristotle [†] himself, who held the arts eternal, as he did the world, yet tells us, there was always a rising and a falling of them as of the Stars, so as sometimes they flourished in one place and age, and sometimes in another, as the Stars sometimes shine in our Hemisphere, sometimes in the other. And so it may fare with that noble and usefull science of the *Civil Law* in like manner; it may be obscured, and under a dark thick cloud for a while in one place or other, but it can never be irrecoverably lost every where, but it will still find some place to prosper in, till at last it be even courted to return thither from whence it was before expell'd.

Lastly, To shew the benefit of clear and rational justice yet farther: As it is of highest advantage and benefit to a Nation, to purchase the acquaintance and correspondence of other Nations abroad, as well for traffick sake by exchanging their commodities together, as also to be
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confederated by a league with them to be made the stronger, and likewise for doing all good reciprocal offices each to other; so nothing can more strongly invite foreigners frequently to resort unto, to trade, deal and communicate with a Nation, than an assurance that in all their dealings, if difference happen to arise, they shall receive plain and clear justice, fetcht as it were from the very bowels of Heaven and Earth, and grounded upon the very same reason they bring into the Nation with them. But if instead of this fair and civil entertainment, they shall be led into labyrinths of something call'd Law, where they can discover no light of that reason whereof they partake as men, nor yet any of those principles, which in the acts of justice are current amongst all other civil Nations: they will conclude, it is not safe nor honourable to converse any longer with such a Nation, but will forsake and abandon it as barbarous.

C H A P. VIII.

That Christian Nations having entertained the Civil Law into their Territories, have thereby acquired to themselves the most rational Law that hath been ordained, as by the constitutions thereof will appear.

THUS have I laid down the most excellent fruits that a Nation reaps by framing for it self such Laws, as are agreeable to the old and ancient grounds of reason in nature, the Grandmother of all Law, justly so styled. Of the which, the Nations of Christendom for these many hundreds of years, have therefore very plentifully partaken, because they have admitted into their Schools and Academies the study, and into their Tribunals the use and practice of the *Roman Civil Law*: for although all publick business, and the general affairs of State, wherein the interest of the common welfare lies, are carried on by Laws of each Countreys own making, fitted to time, place, persons, occasion and accidents that do happen, which the *Civil Law* cannot be made to serve nor suit withall: so various each Nations exigencies and occasions are: Yet they borrow their greatest,
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if not all their light and direction from the *Civil Law*, in settling the contentious business^a of the Subject, and the matters that arise in difference betwixt party and party; their perfectest municipal Laws having contributed so little towards their determination, that in comparison of what they have made no provision at all in, that which they have seemed to provide for, is to be accounted nothing.

^a *Omnia judicia aut distrahendarum controversiarum, aut puniendorum malefactorum causa reperta sunt. Cic. pro Cæcin.*

Most States employ their consideration most upon the publick welfare, and upon such interests as have an universal effect upon the whole body, as easiest to be seen, and requiring but one and the same remedy for all. But in a numerous multitude, and where their transactions and dealings with one another are so various, and indeed by different circumstances become infinite; to suit each persons case and business with a proper and fitting rule to decide it, is a work so void of end or bottom, and past finishing, that no State will set upon the enterprise to begin it; especially when the art and science of the *Civil Law* has done it to their hands so excellently well, and with so much wisdom, pure reason and true natural equity already.

The *Romans* (who through the largeness of their Empire, and the long continuance of it, had dealings with the greatest part of the world then inhabited and

found out, and so had beyond other Nations, the greatest opportunity to see the wonderfull variety of questions and controversies, that fall out between man and man in their mutual transactions, when such a numberless number of them came before their own judicatories) chiefly minded the regulation of such matters; the Laws that are now extant, being almost wholly taken up in them, and handling the publick very sparingly; for of the fifty Books of the Digests, nine and forty do almost wholly consist of these private controversial things. They have taken up likewise all the Code, saving a little of the first Book of it, and the three last Books of all. The Institutes are altogether spent herein, excepting that one title *De publicis Judiciis*, which is the last of all.

Héreof *Cujacius* and *Duarennus* render this reason: *Ideo neglectum est jus publicum*, say they, *quod parum videretur ejus cognitio singulis esse necessaria, quod de rebus privatis frequentiores essent litet, quòdque raro de jure publico interrogaretur*: Therefore by the Roman Laws so little was declared concerning the publick, because the knowledge of such matters was so little necessary for private men, and for that most suits were brought for differences betwixt one Subject and another, as also because little advice was asked upon that

that which concerned the general welfare.

There is nothing therefore upon which a controverſie may be raiſed in our dealings with one another in this life, but to caſt the right where it ought to go, there may be found out in the ſtudy of the *Civil Law*, that, which though it was a Law to the Romans onely, yet has it the force of profound, pure, ſolid reaſon to all other men; ſo perfect, abſolute, and ſo rational a ſyſteme is it of all humane affairs and dealings whatſoever. Neither are we able to prize or eſteem the ſingular benefit that hath grown unto the world by the *Roman Civil Law*, being ſtill extant, as the value thereof deſerveth.

For the precepts of nature, and the rules of natural reaſon, whereof it aboundeth, are either ſuch as we of our ſelves could not eaſily have found out, and then the benefit is not ſmall to have them readily ſet down to our hands; or if they be ſo clear and manifeſt, that no man indued with reaſon can eaſily be ignorant of them, yet the Law as it were borrowing them from the ſchool of nature, to prove other things leſs manifeſt, and to induce a neceſſary conſequence of ſomething which were in it ſelf more hard and dark, unleſs it ſhould in ſuch ſort be cleared, the very applying of them unto caſes particular,

ticular, is not without most singular use and profit many ways for mens instruction.

Besides, be they plain of themselves or obscure, the evidence of so renowned a Law added unto the natural assent of reason concerning the certainty of them, doth not a little authorize and confirm the same. Wherefore in as much as our actions are conversant about things beset with many circumstances, which cause men of sundry wits to be also of sundry judgments concerning that which ought to be done, beneficial it cannot but seem, that the rule of *Civil Law* has herein helped our infirmity, whereby we do so well understand what is right and just, and what otherwise.

Though the first principles of the Law of nature are easie, and discerned generally by all men, yet concerning the duty which natures Law doth require at the hands of men in a number of things particular, so far hath the natural understanding even of sundry whole Nations been darkned, that they have not discerned, no not gross injustice and injury to be so. Whereby it appeareth how much we are bound to admire the profound wisdom, and even honour the memory of the *Roman* Lawgivers, who have delivered such a Law to the world; a Law wherein so many things are laid open, clear and manifest as a light which otherwise might have

have been buried in darknes, not without the hazard, or rather not with the hazard, but with the loss of the rights of many men and nations.

For albeit there is in the *Civil Law*, as there is and must be in all Laws whatsoever, a very great intermixture of such things as are established by the voluntary determination, and proceed from the mere will and pleasure of those that have ordained them, who might limit times, places, forms, actions, rewards, punishments, and difference persons, and might order and dispose of all circumstances in what way and manner they pleased, as the nature, manners, government and occasions of the *Roman* people most required, without any respect to common and universal reason, and are therefore neither obligatory nor usefull to any other State or Nation as they were to the *Roman*: yet there is in it a rational and natural part also, which belongs unto men as men, or to men as they live in politick society, consisting of such common and natural notions, and so abstracted from such circumstances which should change and alter it, that it is always permanent, alike known to all men, or at least to the wiser sort of men, obligatory and usefull every where. And never was there any humane Law that abounded so much with this, as the *Civil Law* doth, it being to be found every where

where about the whole Law, though intermixed with that which is merely positive, proper and usefull for that State and none else, or at least not fitting to be made a rule for all people.

By natural and rational I understand that which our own natural understanding allows as good, or disallows as evil, though there were no Law to forbid the one, or to prescribe the other. And this was the same, which ^b St. Paul expresses to be the guide of the Gentiles, that is, of all men naturally. *The Gentiles which have not the Law, doe by nature the things contained in the Law; which shews the work of the Law written in their hearts.* Also that which is commonly received and practised by all men: *In re consensio omnium gentium lex natura putanda est;* ^c what all Nations agree on is to be esteemed natural. *Quod mundus probat, non audeo improbare,* says ^d Baldus, ^d I dare not question that which is generally allowed of.

^b Rom. 2. 14.

^c Cicer. Tusc. l. 1.

^d Consil. l. 4. Consil. 496.

Likewise I account that natural and rational which is necessary and behovefull for those that lead their lives in any well ordered state of Government, and without which we take away all possibility of a sociable life in the world.

Farther, that justice may well be esteemed natural and rational, which is squared by and accommodated to the nature of the thing in question, as it is defined, and

and as it generally passes in the account of all, or at least the most knowing men.

Neither do I account that onely to be natural and rational which was so when the first foundations of the world were laid, and man became inhabitant thereof; for then all things were common, and men were not gathered into civil societies; neither was there any distinction of Nations, nor any contracts, no waging war, nor leading captive, nor servitudes, nor conjunction of dwellings, nor any limits set to the property of each Man and Nation, as we see at this day. Therefore that must be looked upon as natural and rational, which suits with the present state of affairs, as they now stand in the world at this time: for though the natural Law be always the same, yet some parts of it are primely necessary, others by supposition and accident, and both are of the same necessity, that is, equally necessary in the several cases. Thus, to obey a King is as necessary and naturally reasonable as to obey a father, though the first Governour of all; that is, supposing there be a King, as it is certain naturally a man cannot be, but a Father must be supposed. If it be made necessary that I promise, it is also necessary that I perform it; for else I shall return to that inconvenience which I sought to avoid, when I made the promise: And though
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the instance be very far removed from the first necessities and accidents of our prime being and production; yet the reason still pursues us, and natural reason reaches out to the very last minutes, and orders the most remote particulars of our well being.

Moreover, besides the natural and rational part before spoken of, which either simply concerneth men as men, or which belongeth unto them as they are men linked with others in some form of politick society; there is another sort thereof, which serves to order and direct all such several bodies politick, so far forth as one of them hath publick commerce with another: for although civil society doth more content the nature of man than any private kind of solitary living, because in society this good of mutual participation is so much larger than otherwise: yet we are not satisfied herewith; but we covet (if it might be) to have a kind of society and fellowship with all mankind. And therefore *Themistius* speaking to *Valens* the Roman Emperor, he told him, ^e that Kings if they would act by the rule of true wisdom, they must, *non unius sibi credita gentis habere rationem, sed totius humani generis, & esse non φιλομαχίδες tantum, aut φιλοράμαιοι, sed φιλόανθρωποι*; not take care of their own people onely, but bear a tender regard towards

^e Grot. Proleg. lib. de jure belli. & pac.

towards all societies and companies of men whatsoever, and be lovers of men generally, not of the *Macedonians* or *Romans* onely. And surely God in his wise disposal of all things here below, would therefore not suffer any one part of the earth to be enriched with all his worldly benefits and blessings, but chose rather to sprinkle them up and down, making one Nation to abound with one thing, another with another, but none to possess all things; that thereby the several societies of men standing in need of one another, might be driven to seek and preserve one another's friendship and correspondence, if it were but to purchase these outward temporal things, and to gain those great advantages which are to be had onely in a combined multitude, and for which a single Nation is too weak and impotent.

Nulla est tam valida civitas, says Grotius^t, 'In Prolegom.
que non aliquando aliarum extra se ope indi-
gere possit, vel ad commercia, vel etiam ad
arcendas multarum externarum gentium junctas
in se vires, unde etiam à potentissimis populis
& regibus fœdera appeti videmus. There is
 no countrey so strongly fortified within it
 self, but that it may at one time or other
 be put to implore the aid of other Na-
 tions, either in the way of trade, to put
 off their own commodities in exchange
 for others, or else to secure themselves a-
 gainst a collected force that is about to
 invade

invade them. Hence we often see, even mighty Princes and people so strongly solicit to be in league with other States.

This natural inclination that is in the men of the world, to have the knowledge of, and acquaintance and friendship each with other, how far distant soever they be, did appear so much in *Socrates*, that he professed himself a Citizen, not of this or that Commonwealth, but of the world. And an effect of that very natural desire in us (a manifest token that we wish after a sort an universal fellowship with all men) shews it self by the wonderfull delight men have, some to visit foreign Countries, some to discover Nations not heard of in former ages; we all, to know the affairs and dealings of other people, yea to be in league of amity with them, and this not onely for traffick sake, or to the end that when many are confederated, each may make the other more strong; but for such cause also as moved the Queen of *Sheba* to visit *Solomon*; and in a word, because nature doth presume that how many men there are in the world, so many Gods as it were there are, or at leastwise such they should be towards men. Farther, this conversing with foreign States gets us an opportunity to discern their inclinations, know their strength and riches, or find their weakness, and sometimes to disco-
ver

ver their secret machinations against our selves.

Thus whilst we travel and send out into other Nations in pursuit of our several ends and interests, we fall at length to contract; exchange, transport, and so by degrees establish a fixed trade for return of commodities each to other. This draws on firm leagues of amity and friendship, capitulations to fight against our common enemies, and mutually to defend our selves. And this cannot be transacted without the help of embassies, and the mediation of Ministers, by whom the minds of both are made known, and our agreements sealed and confirmed. Sometimes injury is done by our neighbour Nations, or their Subjects, either in staying our Ships, seizing our goods, restraining our persons, or protecting the publick and declared enemies of the Nation, which causeth us to demand redress and reparation. Which if it be denied or delayed us, if the offence comes from particular men, we right our selves upon some Subjects onely by way of reprizal; if from the State it self, or the most considerable part thereof, then follows the denouncing of open war, and all the concomitants thereof. Besides, when disturbances at home are outrageous, and over-violent, we are sometimes driven to call in foreign forces to appease them.

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Moreover;

Moreover, if there be any Nation that grows so great in dominion, strength and riches, as to strike terrour and amazement into all the neighbour Nations round about it, so as they may justly fear they shall become a prey to their luxuriant power and greatness, to proclaim open war against such a Nation, or to kindle the fire of dissension and civil discord within her own bowels, or to set other Nations upon her back to bring her lower, and to make her incapable of offending her

^a *Principum ac civitatum imperia stabiliora sunt, & ab injuria finitimorum tutiora, cum societates ac fœdera sic contrahuntur, ut æquabilis quædam ex omnibus potentia existat.* Bodin. de rep. l. 3. c. 6.

^b *Sunt qui neutrarum partium se esse verbo declarant, ve tamen facies utrisq; ad bellum inflammandum clam suppeditant: ferendum illud quidem quodammodo, si sua saluti aliter consulere non possint.* Bodin. de rep. lib. 3. cap. 6.

^c *Una est tenuium adversus potentiores*

securitatis cautio, ut scilicet potentes, si nocere velint, non possint; cum nocendi voluntas ambitiosis hominibus & imperandi cupidis nunquam sit defutura. Bodin. de rep. lib. 3. cap. 6.

Also;

weak neighbours, is by many deemed a politick, ^a and by some a lawfull way of anticipation ^b. Which whether it be or no, it is not proper here to determine. But sure I am, to be regardless of such an over-spreading neighbour, were a token of great providence and stupidity. And it were but needfull for the lesser States to confederate and combine together, and to make joint preparations to oppose her, in case she

shall offer to molest any one of them; for so active is man by nature, that where a sufficient power to hurt is present, it is seldom seen that will is wanting ^c.

Also, since it is neither honourable nor advantageous for any young Prince to intermarry even with the noblest or richest of his own Subjects, he must of necessity fit himself out of the royal families of other Princes; here therefore they must be seen, known and dealt with also. Besides a free and open recourse to foreign parts, is so absolutely necessary to the very being of a Nation, that we see oft-times the restraint and shutting up thereof in point of trading, does so exasperate and incense a people, that the whole frame is ready to be dissolved, and the Subjects ready to rend one another in pieces, not sparing to discharge their anger even upon the very Prince himself.

These and such like instances do demonstrate, how, not onely advantageous, but unavoidable it is, for several and divided Kingdoms to correspond, act and negotiate each with other: which it is not possible for them to doe, but that controversies both various and difficult, and which mainly concern their several interests, even to no less value sometimes than whole Kingdoms, will fall in; that must be debated, and must have some determination. And when every thing else has a Law to guide it, and a rule to examine and try it by, insomuch as no one society, or petty Common-wealth can stand without some Law; the like

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necessity

necessity must there needs be of a Law to maintain and order the communion of Nations corresponding and acting together. *Si nulla est communitas qua sine jure conservari possit, quod memorabili latronum exemplo probabat Aristoteles; certe & illa*

* In Proleg.

qua genus humanum aut populos complures inter se colligat, jure indiget, says ^k Grotius: If there be no association which can be held up without some Law, as *Aristotle* hath proved by an argument drawn from that close partnership which is usually amongst Thieves and High-way-men; then surely is there want of a Law to direct that grand fellowship, which links all mankind, or divers States together. And

[Grot. *ibid.*

again, ^l *Sicut cujusque civitatis jura utilitatem suae civitatis respiciunt, ita inter civitates aut omnes aut plerasque ex consensu jura quadam nasci potuerunt, & nata apparet, quae utilitatem respiciunt non coetuum singulorum, sed magnae universitatis;* As the Laws of every particular Common-wealth are made for the benefit thereof, so some certain Laws might be and were certainly agreed upon by all or most of the Nations of the world, which should conduce to the welfare, not of any one people, but of the great communion of all men.

Now the Law that guideth those transactions which are usually observed to arise between grand Societies, is the Law of Nations: which is most natural and rational

rational in its kind too, being grounded at first upon a common necessity that lay upon all Nations, to have reciprocal dealings and negotiations with one another, and which the very nature of those several dealings, and reason it self dictates as necessary to be observed, so that without it such communion could not long endure.

Under the regulation hereof come embassies, courteous entertainment of foreigners and strangers, Laws of arms, freedom of traffick, right of contracts, free passage through each others borders, re-prizals, the preserving and redemption of captives, leagues, truces, articles and such like. The strength and virtue of which Law is such, that a people can with as little safety violate it by any act, how advantageous soever it may seem to be to the whole body^m, as a private man can, in hope to benefit himself, infringe the Law of his Countrey. *Sicut civis qui jus civile perumpit utilitatis presentis causa, id convellit quo ipsius posteritatisque suae perpetuae utilitates continentur; sic & populus jura naturae gentiumque violans, suae quoque tranquillitatis in posterum rescindit munimentaⁿ:* As a Subject trespassing against the Law for a present advantage, brings the future happiness of himself and posterity into hazard, so a people that shall trample upon the Law of Nature and of Nations,

^m *Qui civium rationem habendam dicunt, exteriorum negant, hi communionem & societatem humani generis dirimunt. Cicer.*
ⁿ *Grot. in Prolegom.*

strips it self of the onely preservative of their peace and safety. It is not onely lawfull but honourable for any people, either to right or revenge the breach of the Law of Nations. And as in the state of one Countrey, any man may accuse upon a publick crime, so in the State of the world, any people may prosecute a common offence: for as there is a civil bond among all the people of one Nation, so there is a natural knot among all men in the world, which should it be once dissolved, it must needs endanger the whole frame of that communion. Nay of such power and pre-eminence is the Law of Nations, that no particular Nation can lawfully prejudice the same by any their severall Laws and ordinances,

• *Si Princeps velit vel ius gentium primarium vel secundarium intra sui imperii limites abrogare, potestate sua abuti censendus est.* Barbos. collect. in c. 9. dist. 1. nu. 6.

¶ *Lib. 2. con. Appion.*

¶ *Lib. 9. de sanand. Grec. affect.*

° more than a man by his private resolutions, the Law of the whole Commonwealth or State wherein he liveth: for as a *Civil Law*, being the act of a whole body politick, doth therefore over-rule each severall part of the same body, so there is no reason that any one Commonwealth of it self, should to the prejudice of another, annihilate that whereupon the whole world hath agreed: for which cause the *Lacedemonians* forbidding all access of strangers into their coasts, are in that respect both by ¶ *Josephus* and ¶ *Theodoret* deservedly blamed, as being enemies to that hospitality, which for common

mon humanity's sake all the Nations on earth should embrace.

And the *Roman Civil Law* is of singular use to teach and instruct in this Law too. *Grotius*, the ornament of his age and Nation for learning and wisdom, undertaking in his most singular Book *de jure Belli & Pacis*, to set down the several heads of that Law which serves to direct those great transactions of peace and war between Nation and Nation, and to reconcile their differences, professes to have borrowed towards the perfecting of that admirable work, much from the Books of the *Civil Law*, because, saith he, ^r *Rationes saepe optimas suppeditant ad demonstrandum id quod juris est natura; & eidem juri neque minus gentium juri testimonium saepe praebeant*; They often make very clear discoveries of what is the Law of nature, and do give frequent instances both of that, and of the Law of Nations also.

And indeed the Law of Nations is no more than that natural reason which Nations do owe and are bound to render each to other, whilst they correspond and act together, be it in peace or war; and but the very same which private men ought to practise amongst themselves in their private dealings. Which moved *Master Hobbs* ^c, when for illustration sake he divided the natural Law, in *naturalem hominum*, & *naturalem civitatum*, into that

^r *Lib. de Civ. c. 14. art. 4.*

of private men and that of Nations, to add, that *praecepta utriusque eadem sunt; sed quia civitates semel institutae induunt propri-*

† L. 76. Dig. *etates hominum personales* †, *lex quam, loquen-*
de jud. l. 56. tes de hominum singulorum officio, naturalem di-
dig. de usu- cimus applicata totis civitatibus, nationibus
fruct. Populi *sive gentibus, vocatur jus gentium*: The pre-
respectu totius *cepts of both are but one and the same;*
generis huma- *but, saith he, because several Common-*
ni privatorum *wealths once settled are but as so many pri-*
locum obti- *vate; men the same Law which in reference*
ment. Grot. *to single men we term natural, being appli-*
Mare lib. c. 5. *ed to whole States, Nations and People, is*
call'd the Law of Nations, their duties be-
ing indeed both alike: for what one man
ought to render to another, the same ought
one Nation to render to another also.

So that although whatever we reade of in the text of the *Civil Law*, was not intended by the *Roman* Legislators, to reach or direct beyond the bounds of the *Roman* Empire, neither could they prescribe any Law to other Nations which were in no subjection to them, and even those Laws that do treat of military matters, prisoners of war, embassies; and such like, do but direct what order and discipline shall be kept among their own Souldiers, and how if any of them be taken by the enemy, they forfeit the right of Citizens for the time of their captivity, but shall upon return be restored; and how free from being sued or molested, Embassa-
dours

dours that come from their own Provinces, not from foreign States to *Rome*, should be; and so all those constitutions and such like, have still looked home-wards, and no farther, as *Albericus Gen-tilis* has truly observed: Yet since there is such a strong stream of natural reason continually flowing in the chanel of the *Roman* Laws, and that there is no affair or business known to any part of the world now, which the *Roman* Empire dealt not in before, and their justice still provided * for; what should hinder, but that the nature of affairs being the same, the same general rule of justice and dictates of reason may be as fitly accommodated to foreigners dealing with one another, (as it is clear they have been by the *Civilians* of all ages) as to those of one and the same Nation, when one common reason is a guide and a light to them both: for it is not the persons, but the case, and the reason therein that is considerable altogether. How came the old Law given to the *Jews* to be in some measure obligatory to the *Christians* coming so long after, and to be of force still, and will be as long as the world endures, but because, besides the ceremonial and judicial part thereof, (which was observable by the *Jews* onely, and is now abrogated, in as much as it had but a temporary cause of God's ordaining it) there was also

*Lib. 1. de
jur. Bel. c. 1.*

* *A Romanis
ad omnes po-
pulos juris fæ-
cialis totiusq;
justitiæ fontes
purissimi ma-
navunt. Bod.
de rep. l. 5. c. 6.*

⁊ De Legib.

lib. 9. cap. 11.

nu. 22.

so a natural and a moral part incorporated in it, which all nations and men are bound to fulfill and keep, and can never cease? *⁊ Hac pars legis vivit, says Suarez, non tamen quia legis Moysis pars, sed quia natura lex est, & novæ legis pars, vivetque in sempiternum:* This part of the Law remains in force, but not because it was a part of *Moses* his Law, but because it was given first by Nature, and the new Law has since confirmed it, and the authority thereof shall remain for ever.

So and in like manner, there is in the *Roman Civil Law* a circumstantial and a positive part, which was a Law to the *Romans*, and by them to be obeyed, but neither of force or use to others, being made for that people, climate and government onely. But there is in it too a Law whereunto by the light of reason men find themselves bound in that they are men; a Law by composition, for multitudes and politick societies of men to be guided by; a Law that may be applied to the communion and fellowship of all mankind, or divers Nations linked in amity and friendship together; and this part of the Law is natural, perpetual belonging not to the *Romans* onely, but to all Nations and Men; neither can it have any cause of change, when that which gave its first institution remaineth for ever one and the same.

Yet

Yet as the *Civil Law* is *Roman*, it is of no validity, but as it is natural onely: for as it was *Roman* it extended not beyond the bounds of the *Roman* Empire, nor did it take care for any other People or Nation but the *Roman* onely, nor could the commanding power thereof endure longer than the Empire it self lasted. But when it treats and discusses such matters as are common to all mankind, and not onely the *Roman* Nation did, but all Nations and People do still deal in; as of contracts of all kinds, both at Land and at Sea, dispositions testamentary, successions in deceaseds estates where no will is made, good offices done at another's charge or detriment; of the relations between Father and Son, Husband and Wife, Master and Servant, Governours and Governed, Magistrates supreme and subordinate; of matters of property and possession, injuries done to the persons, or scandals to the credit, or damages done to the goods of men; of servitudes due from houses or lands to other houses, lands or persons, crimes and offences of all sorts, and the punishments greater or lesser that attend them; explanation of Laws or Statutes, or of any obscure clause in any contract, speech or writing whatsoever; of customs and other publick duties payable to the Exchequer; authorities, powers or commissions granted to others: deeds

deeds of free gift, writings obligatory, instruments, patents, charters, privileges in writing or by prescription; customs and prescriptions to take away or diminish the right and property of others: of reparations upon fraud, non-age, absence, or other impediments unavoidable and necessary; nuisances done in publick places or high-ways, or from one house to another, obstructions in rivers or water-courses, mortgages in Law as well as fact: of goods lost in Ships, Taverns, Inns or delivered to Carriers to convey to other places, or left with other men to keep; services due to the Commonwealth, patrimonial, personal and mixt, Souldiers and the exemptions and discipline belonging to them: Of judicial trials in all these cases and many more, where the quality of the Judge, his kind of jurisdiction, the manner of trial, the officers assisting, the kind of evidence, the judgment, the execution thereof, or remedy by way of appeal come to be considered: I say, when the consideration of these several matters is as incident to all other Nations and times that live under order and government, as it was to the *Roman*, and that there be delivered and laid down in the *Roman Civil Law* such rules and dictates as are most natural, essential and necessary to be observed in each of them; it must needs be, that the use of the *Roman Civil Law*

Law in these particulars, as to the matter of it, can neither be local nor temporary, neither be limited to that Empire, nor determine with it, but must be of use every where, and for so long time as the business to which those rules are applied, comes to be acted and dealt in, which will be as long as the world it self endures, and untill men leave to traffick and converse with one another.

Now as in the matters before specified, the difference that arises may be sometimes between the publick and some private person, sometimes between one private man and another within the same Nation; so it may be also between a subject and a stranger, or between strangers onely, or between Nation and Nation; and yet the same measure of justice will hold and serve for all. For look what justice may be rightly afforded between one man and another upon the general rule of natural equity and right reason, the same may as warrantably be dispensed between one Nation and another, as oft as any variance happens between them.

And hence it is that all those writers that handle and treat of those controversial things, which frequently come to be disputed between one Nation and another, as they are all Civilians, so though they do make use of other authorities besides,

besides, yet the strongest and most convincing arguments that they bring to resolve them by, are fetcht from the general rules of equity and right reason set down in the *Civil Law*. And were it not for them, we had no certainty to rest upon, nor any peaceable determination could be made of such controversies, but the sharpest sword must be drawn out to cut the knot asunder: For what can Histories and the examples drawn from them doe towards a compōsure? *Errant, qui quod exemplo fit id etiam jure fieri putant*, says ² *Ayala* out of *Cicero*; It is an error in any to think, that what has once been done, may therefore be lawfully done again. The force of example is weak and insufficient, *Sana ratio exemplis antepōnitur*, says ^a *Albericus Gentilis*; Sound reason is far above examples. Besides, the integrity and truth of Histories is questionable, *Sæpe tempori, sæpe affectibus serviunt*; and they too too often afford examples contrary each to other.

And moreover, by as it were a general consent of Nations, there is an appealing to, and a resting in the voice and judgment of the *Civil Law*, in these cases between Nation and Nation. The reason whereof is, because any thing that is irrational, unnatural, absurd, partial, unjust, immodest, ignoble, treacherous or unfaithfull, that Law abhorreth; and for that

² *De jū. & offic. Bell. l. 1. c. 2.*

^a *De jū. Bel. l. 2. c. 18.*

that it is the most perfect image and representation of nature, and of the equity and reason nature prescribes to humane actions, that was ever yet presented or set forth to the world in a Law. And therefore whosoever will observe the style of the imperial Law, he shall find it least of all to run in this strain; *Sancimus, mandamus, precipimus, jubemus, imperamus, volumus*; We decree, command, will, enjoin, enact, or in the like imperious and commanding way, but most in a gentle, soft, rational and a convincing way, thus; *Non est æquum. Nulla juris ratio, aut æquitatis benignitas patitur. Bona fides non patitur. Divine admodum. Non est dubium. Nimis grave est. Non sine ratione. Nihil tam naturale. Naturalem habet intellectum. Dolo facit. Absurdum est. Contra bonos mores est. Cùm satis inhumanum est. Cùm nulla ratio sit. Humanitatis ac religionis ratio. Humanitatis intuitu. Humanum esse probamus. Ita nobis cordi pudor est. Indignum est. Iniquissimum est. Cùm ratio naturalis. A plerisque prudentium generaliter definitum est. Improbum quidem & criminofum. periniquum. Æquissimum visum est. Æquissimum putavit prætor. Boni viri arbitratu. Juxta arbitrium boni viri. Hic titulus æquitatem habet naturalem. Hoc edictum summam habet æquitatem, & sine cujusquam indignatione iusta. Ut moderate rationis temperamenta desiderant. Nec veretundie nec dignitati*

dignitati convenit. Nemo est qui nesciat, and the like, as if nothing were offered for a Law, but what is evident in it self, and all men must own and presently apprehend to be just and equal.

There never was any Law more agreeable to the divine, and to the rules of conscience and exact righteousness, than that Law. *Tertullian* in his *Apologetick* against the *Romans* did acknowledge, *Eorum leges ad innocentiam pergere, & de divina lege ut antiquiore, ferme mutatas*; that their Laws did walk in the way to innocence, and were almost the same with the divine Law. *Philip Melancthon*, another Divine and a Protestant, says that and more: *Ad normam effectam in mentibus humanis, & Decalogi voce declaratam atque illustratam congruunt humane leges, quæ citra controversiam post Mosaicam ceteris ut antiquitate, sic dignitate; ut auctoritate sic veritatis certitudine; ut rationum & demonstrationum evidentia, sic ordinis præstantia antecellunt*: The *Roman* Laws, saith he, are made after the likeness of the Decalogue, and do not differ from those notions and principles of reason which nature hath implanted in all men. And it is out of all question, that setting aside God's Law, they are as more ancient; so more renowned; as of higher authority, so truer and clearer in determination; as of a more evident demonstration and reason, so of a more

more excellent rank than other Laws that yet have been.

Which conformity and likeness of the *Civil Law* to the divine and eternal, has been the onely cause, that the Casuists and Divines that have treated upon cases of conscience, and have laboured to teach men what rules they must walk by, to doe justice, and to execute righteousness in their dealings and communications with one another, they do every where about their books and writings, propose and set down the very rules and maxims of the *Civil Law*, as the best lessons of morality and justice, citing the very Laws themselves, and the authorities of that profession; which were incongruous and vain for them to doe, were not their justice, equity and soundness unquestionable, and their authority beyond all dispute, even in those things for which their authority is brought by them. Neither is it they alone that set this high estimate upon the authority of the *Civil Law*, since the learned in other faculties doe the same: with whom there is nothing more frequent; than when the duties of men one towards another in their several relations come to be set forth, as between Parents and Children; Masters and Servants; Husband and Wife; Sovereign and Subject; Magistrates and private Men; Captain and Souldiers; one Citizen with
I another;

another; or when the best rules and advantages are to be laid down for the first founding of a Commonwealth, or the keeping of it in safety and splendour; or when the justice and convenience of a Law is in question; or the actions of men, even of Princes themselves, be to be approved or condemned: In all these cases and the like, nothing I say is more usual with writers of highest renown for learning and wisdom, than to fortifie their resolutions and dictates one way or other, with the practice and discipline of the *Roman State*; and to make the *Civil Law* their touch-stone to try all things by, and the best and most approved balance to approve them in; judging the authority thereof to be beyond denial in any thing that it does either defend or disallow, and for such as it is presented, does it pass current with all men.

The *Civil Law* requires that an act should be worthy and laudable as well as lawfull, that it should be fair, equitable, ingenuous and candid, as well as strictly just. Subtilties and niceties of words, and those *apices juris*, finenesses of Law, and fine-spun webs of wit, which are opposite to integrity and honest dealing, and which through a precise form of words and strict propriety of speech, would frustrate what was purely at first intended, it will not allow of or endure.

Bona

Bona fidei non congruit de apicibus juris disputare, says Ulpian. ^a It suits not with sincerity, to contend about curiosities: *Sen-*

sum non vana nominum vocabula amplecti oportet, ^b The true intended sense and not the bare literal signification is to be pursued.

Scriptum sequi calumniatoris est, boni verò judicis, voluntatem scriptoris auctoritatēque defendere, says Gail. ^c It is the part of a caviller to keep close to words, but of an upright Judge, to uphold the intent and meaning of him that spake them; *Qui pertinaciter à scripto recedere non vult, perniciosè errat,*

says Peckius; ^d He shall offend perniciously, that will grant but what the very words will bear, and will be got to yield no farther.

And therefore the *Civil Law* which we have now, had it been in being in the third Punick war, when the City of Carthage by a crafty exposition of words was quite demolished by order of the Roman Senate, after they had first given their faith to the Carthaginians, in these expressions; *Civitatem Carthaginis salvam fore, jura, privilegia, immunitates easdem habituro;*

quibus antea semper usi fuissent, The City of Carthage should be saved, and the same rights, immunities and privileges should be continued unto them which they always had; would have condemn'd the whole Senate for such their breach of faith and treachery, though there was not

^a L. 29. *Pa-*
rag. 4. Dig.
mandat.

^b L. 2. *Co. de*
const. pecun.

^c *Lib. 2. obs.*
132. out of
Cicer. pro Ca-
cinn.

^d *Ca. 88. de*
reg. ju. in 6.
in princ.

the life of any person touch'd. For who could doubt, but that the *Carthaginians* articling for the safety of the City, did aim and intend to have the place preserved as well as the persons? And it was a shamefull defence to say, as the *Romans* did, that when the people of the City were all preserved and kept alive, the true City was saved, which was as much as they promised, though the walls and buildings themselves were destroyed; *Civitatem manibus urbis minimè contineri*, The word City does import the men, and not the structure or edifices thereof.

For although in strict propriety of speech there is that nice difference *inter urbem & civitatem, quod urbs aedificia, civitas incolae sint*; yet *leguleiorum est, syllabas & apices aucupari, non militaris simplicitatis*, says *Albericus Gentilis*;

* De jur. bel.
lib. 2. c. 4.

* It is for Lawyers to catch at words, and not for Souldiers, whose plain meaning admits not of such nice distinctions. *In fide, quid senseris non quid dixeris cogitandum est*; says *Grotius*;

* De ju. bell.
lib. 2. c. 16.
nu. 1. out of
Tully.

* Where faith is given, what was meant is to be regarded rather than what was spoken. The *Plateans* were as false and unworthy, when after they had promised to send home the prisoners taken, slew them first, and so sent them home dead, *quasi cadavera essent captivi, & mortuus homo esset homo*, says *Albericus Gentilis*; * as if it were to be believed, that the carcases

* D. ca. 4.

were

were the prisoners themselves, or a man dead could be thought a man. And as deceitfull were the *Bæotians* too, who having ingaged to restore the City, did deliver it up, not standing, but rased and pull'd down. So was it an act most treacherous and false in *Alexander*, who first gave a besieged Town an assurance that they should go forth of the Town safely, and then after they were quite gone forth, and set forward some part of their way, put them all to the sword. *Grotius*^h says ^{h D. ca. 16.} truly, *ejusmodi fraudibus astringi non dissolvi* out of *Tully*. *perjurium*, by such fraudulent evasions perjury is rather augmented than wiped away.

In contracts between Princes or several States, *exuberantior fides requiritur*, a greater measure of sincereness is required, and subtle interpretations ought to be avoided, and such a meaning ought to be given to their compacts, as not criticks, but vulgar and plain-dealing men may like of, and which was most probably intended by him for whose sake and benefit they were originally made. And in such sense Divines do agree all oaths ought to be taken; *Quacunque arte verborum quis juret, Deus tamen qui conscientia testis est, ita hoc accepit sicut ille cui juratur intelligit*, says *Isidore*, cited in the Canon Law. ^{i C. quacun q} Let the words by which we ^{caus. 22.} swear be never so artificially laid, yet ^{quæst.} God

God, to whom our most secret thoughts are manifest, takes every oath in such a sense, as it is understood by him to whom such oath is made. For which cause Saint

^k *Epist. 224.* ^k *Austin* has pronounced them perjured, *qui servatis verbis, expectationem eorum quibus juratum est deceperunt*; who having fulfill'd the bare words, have frustrated the true expectation of those to whom they swear. Even as the Civil and Canon Law both, deems them not fulfillers but fraudulent transgressours of a Law, that perform the words, but act against the true intent and meaning of it. *Certum est, quod is committit in legem, qui verba legis complectens, con-*

^l *L. 5. Cod. de leg. reg. 88. de reg. ju. in. 6.* *tra legis nititur voluntatem*: ^l Whosoever keeping strictly to the words of a Law, perverts the intent, does clearly offend against it: For *Lex non in verbis sed in sensu, non in superficie & foliis verborum, sed in medulla consistit*, says *Peckius*. ^m The Law lies not in the outward bark of the words, but in the pith and marrow, which is the sense.

Likewise in last wills and testaments, it will have the mind and meaning of the Testator, if known, to be persued, whatsoever the proper signification of the words be. *Non enim in causa testamento-*

ⁿ *L. 69. Pa- rag. 1. Di. de leg. 3.* *rum, says Marcellus, n ad definitionem utique descendendum est, cum plerumque abusive loquantur, nec propriis nominibus ac vocabulis semper utantur*: In questions about wills,

we

we must not flie to that the words will in extremity bear, since most do speak improperly, and they are but few that can deliver themselves in proper and apt expressions. And therefore says *Mantica*,

¶ Cavendum est, ne dum nimia subtilitate verborum utimur, vera judicia defunctorum subvertantur ; We must take heed, that we

do not so precisely observe the words, as to disappoint the true intentions of him that uttered them. From which sentences and sayings of the *Civil Law*, it is clear, that no words, forms, niceties or propriety of language is of any regard in the *Civil Law*, in comparison of truth, faithfulness and integrity. For, *verba menti, non mens verbis servire debet* ; Words were made as instruments to serve and expresse the mind, and not to command or controll it.

Farther, it takes care to suppress not onely those things which are manifestly evil, but some things also which are no other-wise bad, than as they are illaudable and undecent. *Non omne quod licet honestum est* ;

¶ Every thing that is lawfull, the *Civil Law* does not esteem to be honest. If a divorced wife marry again, and by that marriage has a daughter, though she be not daughter-in-law to the first husband, nor any way allied unto him, since the first marriage was quite dissolved, yet he cannot marry her : *¶* Neither will it allow the father to marry his bastard daughter ;

De conject. ult. vol. lib. 3. Tit. 3. nu. 1.

¶ L. 144. Dig. de reg. jur.

¶ Parag. 9. inst. de nupt.

nor the father to marry the son's spouse, nor the son to marry the father's; the reason is, *quoniam in contrahendis matrimoniis naturale jus & pudor inspiciendus est*;

¶ L. 14. Parag. 2. Di. de rit, nupt.

in matrimonial copulations it ought to be considered, what nature and sobriety does allow of; and where it is doubtful, whether a marriage may be lawfully had or not, this rule is ever prescribed; *In re dubia certius & modestius est hujusmodi nuptiis abstinere*; in an uncertainty it is safest and most modest not to contract such marriages. So that in some things, *Quod non vetat lex, hoc vetat fieri pudor*; and as Bartol has expressed it, *Non modo obligatio, verum etiam verecundia nos obligat*; There be some things, which for very shame we must forbear to doe, though otherwise the Law will permit us to doe them.

¶ D. l. 14. Parag. 3.

¶ L. 8. Dig. de Aliment. leg.

The Civil Law tells the very Emperour himself, that for him to demand a legacy by a will that was void, *inverecundum est*, it was undecent. *Decet enim tantam majestatem eas servare leges quibus ipse solutus esse videtur*;

¶ L. 23. Dig. de legat. 3.

It is most befitting his Highness for to keep those Laws whereof he may seem to be free. And again, *Digna vox est majestate regnantis, legibus alligatum se profiteri*;

¶ L. 4. co. de legib.

It is language worthy of a Prince, to acknowledge himself bound to Laws. What did Seneca in his grave philosophical precepts say more, when he cried out; *Quam angusta innocentia est, ad legem*

legem bonum esse? quanto latius officiorum patet quam juris regula? multa pietas, humanitas, liberalitas, justitia, fides exigunt, quæ omnia extra publicas tabulas sunt. How poor is that innocence, to be but as good as the Law requires? How much farther do the officious respects which men owe to one another goe, than the letter and rule of Law? How many things be there, which piety, humanity, nobleness, equity and uprightness do exact, which are out of the provision of the Law altogether?

When any thing in Wills, Contracts, Laws, Statutes or Testimonies, is rendered so doubtfull, that it is capable of a tetrick and severe as well as a mild and temperate, of an odious as well as a favourable meaning; it does so much affect clemency, gentleness and moderation, that the gentlest and the softest interpretation shall be chosen, and it shall be taken in the mildest and best sense. What is odious and punishing, it restrains and keeps in to the utmost, and admits of nothing more in that case, than the strict propriety of words will enforce. But what is favourable, gracious and pleasing, it enlarges and widens, by stretching them even to an improper sense and signification. These rules therefore and such like are to be frequently met withall.

Semper in dubiis benigniora præferenda sunt.
z Rapi-

z Nihil nobis tam gratum est quam humanitas, says Justinian lib. 57. co. de Episcop. audient.

^a L. 56. Dig. ² *Rapienda occasio est quæ præbet benignius responsum². In re dubia benigniorem interpretationem sequi, non minus justius est quam tutius.* ^b *In pœnalibus causis benignius est interpretandum.* ^c *Satius est impunitum mæ-*
^a L. 168. Dig. *nere facinus nocentis, quàm innocentem com-*
 eod. *demnare.* ^d *Semper in obscuris, quod mini-*
^b L. 119. *mum est sequimur.* ^e *Odia restringi, & fa-*
 Dig. eod. *vores convenit ampliari;* ^f and the like to
^c L. 155. Pa- *an infinite number. Not any thing short*
 rag. fin. Dig. *of the same Seneca, & when he says; Reus*
 eod. c. 49. ext. *sententiis paribus absolvitur, & semper quic-*
 eod. *quid dubium est, humanitas inclinat in melius;*
^d L. 5. Dig. *Where the suffrages of a Court are equal,*
 de pœn. *the defendant stands acquitted; and where*
^e L. 9. Dig. *any thing happens to be doubtfull, cle-*
 de reg. jur. *mency will always pitch upon the gentlest*
^f Ca. 15. ext. *resolution.*
 eod. *Neither does it derogate from the cle-*
^g Epist. 81. *mency of the Civil Law, that it seems*
 to deal so sharply with those (against
 whom there are grounds enough to sus-
 pect them of some enormous crimes
 whereof they are accused, but not evi-
 dence full enough to condemn them) as
 to allow such persons to be ^h set upon the
 rack thereby to manifest their innocence
 by an obstinate denial, or to discover
 their guilt by a plain confession. For the
 onely ground of this austere proceeding
 was a great tenderness not to take away
 the lives of any, but upon most manifest
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 notwith-

^h Dig. & Co.
 de question.

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 and undeniable proof; and yet with a care
 notwith-

notwithstanding, that for want of such full and clear proof (which offenders through their secret workings would always labour to prevent) offences should not go unpunished, to the endangering of the publick peace and welfare of other men.

When a man is criminally accused, there are but two ways to convict him, either by his confession, or by proof. As to confession; where is it seen that he that dares to offend highly, when he comes to be examined, does not deny it as boldly? and who is there that does not excuse him for seeking thus to preserve himself? *Ignoscendum est ei qui sanguinem suum qualiter qualiter redemptum voluit,*

says the *Civil Law* it self; that is, He is to be pardoned, meaning as to punishment, that labours by any means to avoid the shedding of his own blood. As to proof, the *Romans* were so tender of the lives and personal safety of their people, that to convict a man by proof it was no easie thing, but very difficult; for they would neither inflict any corporal punishment, nor condemn any man to death, as some Christian States do at this day, upon the testimony of one single witness, though present when the act was done. ^k And in this it did exactly follow the best pattern of all other, the Law of God; ^l One witness shall not rise up against a man for any

^l L. 1. Dig. de bonis eorum qui ante.

^k Gomez. var. resol. Tom. 3. c. 12. de probat. delict. ^l Deut. 19. 15, 17, 6.

iniquity, Numb. 35. 30.

iniquity, or for any sin, in any sin that he sinneth: at the mouth of two witnesses, or at the mouth of three witnesses shall the matter be established.

By the Roman Law therefore, before death or other personal punishment could be inflicted, there were to be two witnesses; they must be free from all exception, and especially they must be none of the accuseds complices, who could not be evidence against one another; they must not by remote circumstances, or by any light ^m presumptions, but clearly and conclusively depose the thing; and their testimony must be agreeing also not only as to the act done, but as to place, time, person and other material circumstances, wherein if they did vary or disagree, the proof was insufficient. Three of the Roman Emperours, Gratian, Valentinian and Theodosius, did all agree in giving to all publick accusers this advertisement: ^o *Sciant cuncti accusatores eam se rem deferre in publicam notionem debere, quæ munita sit idoneis testibus, vel instructa apertissimis documentis, vel indiciis ad probationem indubitatis & luce clarioribus expedita;* Let all accusers take notice that they must offer that to publick trial which is furnished with legal witnesses, or attended with most luculent proof, or may be made out by arguments of unquestionable conviction, and clearer than the light it self.

The

^m L. Final. co.
de accusat.

ⁿ L. absentem
parag. 1. Dig.
de pœn.

^o L. 25. co. de
probat.

The case therefore thus standing, that the wickedness of men was grown luxuriant and abounding, that it acted in secret altogether, that it would never betray it self, and witnesses sufficient enough to condemn them could hardly be found; It was but necessary ^p for the publick peace, and the safety of innocent and quiet men, to make them by a vigorous course of trial either fear to offend, or be instrumental to condemn themselves, rather than they should be encouraged to offend freely, out of a presumption that their evil actings should never be brought to light. For if there were but one positive witness that saw the thing done, as it was mercy and clemency in the Law not to condemn the accused presently upon so short a proof; yet were it safe, were it not ^q cruelty to all the people, were it not of ill example to absolve him quite without a farther trial, merely because there was no better proof; which their ill-minded subtilty, making an ill use of the favour of the Law, was a cause of too? So that to bring men to the rack in such cases for trials sake, is not to be censured for cruelty; *Non ex sevritia, sed ex bonitate talia faciunt homines*, saith ^r Saint Chrysostome; Such things are done by men not out of cruelty but goodness. And I must say with ^s Mestertius, who stily maintains this proceeding in the *Roman Law*: quil.

^p Bonum innocentis bono nocentis; bonum commune privato ante habendum est ordinata directionis lege; ex dilectione autem innocentium capitalia iudicia nata sunt. Gror. de jur. bel. lib. 1. c. 2. §. 8.

^q Sicut est aliquando misericordia puniens, ita est crudelitas parcens. Augustin.

^r L. ad Corin. 3. 12 de poenis humanis agens. ^s De justit. Roman. leg. lib. 2. dubit. 64. arg. l. 51. parag. ult. Dig. ad l. A. Law: quil.

Law: *sanè hic juris rigor (si aliquis sit) utilitate publica compensatur*; This rigour of the Law (if it be any) is recompensed with advantage to the whole Commonwealth; for by the terrour hereof it is free from the machinations of wicked and lewd men. And though there have been some, as *Ludovicus Vives* writing upon *St. Austin*², and Sir *John Fortescue* in his praises of the Laws of *England*, who have with very much acrimony defended the contrary; yet I must say to them as the * three Emperours, *Valentinian*, *Theodosius* and *Arcadius* once said; *Removeantur patrocinia, quæ favorem reis, & auxilium facinorosis impertiendo, maturari scelera fecerunt*; Away with those apologies, that by assisting persons that are accused, and pleading on the behalf of wicked men, are an occasion for wickedness to spring up and fructifie; for surely it must needs grow most, and wax most vigorous there where it is most gently dealt withall: though as to the first, (unquestionably a most learned man) whosoever reads him in that place, he may see that he there condemns this trial by torture, looking upon it in the general onely, and as used arbitrarily and without any rule or measure at all, and not as it was practised under the rules and cautions of the *Roman Law*. As for the other; though he is zealous to prefer the Law of this Nation before the *Civil*

* *De civit.
Dei lib. 19.
cap. 6.
v. Ca. 22.*

* *L. 3. Co.
Theod. de
defensor. civi-
tat.*

Law, and all other *Laws* of the world besides, yet he could not have been so bitter in censuring the *Civil Law* in this particular, if he had remembred with what measure of severity those that are arraigned for capital crimes, are handled by that *Law* that he does so much commend; which, because others of that profession have lately taken such free notice of, themselves need not mention.

And yet was not this practised amongst the *Romans* onely, nor ^v they the first authors of it; for they took it from the *Gracians*, and from the people of *Rhodes*, whom they followed in most things. And ² *Wesenbeck* says of it, that it was *mos antiquissimus, omnium fere bene institutorum populorum communis; ut non immerito pro lege ac jure quodam gentium habeatur*; It was an ancient observation, common almost to all well ordered Commonwealths, that it may very justly be accounted of as it were a *Law of Nations*. And if we look into our own historians, and ³ books of *Law*, we shall find that there has been a kind of trial very anciently in use amongst our selves here in *England*, very near to this of the *Romans*, and in severity no whit inferior: For there were certain ordeal *Laws* which were used in such doubtfull cases, whereby when clear and manifest proofs were wanting, they did try and find out whether

^v *More majorem introducit esse inquit Cicero, ut per tormenta veritas exquiratur. in Partit. Oration. 3.*

³ *Cowel's Interpret. verb. Ordel.*

ther the accused were guilty or guiltless. And this they were wont to execute one of these three ways, either by fire, or by water, or by combat. For sometimes men were enforced to decide matters in controversie not onely criminal but civil; by the death of one another in a duel. Sometimes they were adjudged to take

^b Which was practised upon Queen *Emma*, the Mother of King *Edward* the Confessour, to clear her self of adultery with *Allwin*, Bishop of *Winchester*, or as some write, upon *Allwin* himself. *Hack-will. Apolog. of God's Provid. lib. 4. cap. 2. § 5. Isaacson's Chronolog. Anno 1030.*

red-hot irons into their bare hands; and sometimes to walk bare-foot over red-hot Plough-shares blind-fold: Their judgment by water was either by appointing the party accused to thrust his armes up to his elbows in seething hot water, or by having a cord tied about him under his armes, to be cast into some river.

In these cases, if the accused parties go over seven plough-shares laid a little distance one from another, and either tread besides them; or treading upon them with their bare feet; or taking the hot irons in their bare hands, did receive no harm: and so if the parties putting their armes into the hot water; were not scalded; or they that were cast into a river, did sink down into the bottom thereof until they were drawn up; they were pronounced innocent and not guilty: but if they were burnt by the hot irons, or scalded by

by the hot water, or could not sink to the bottome of the river, or were slain or vanquished in the combat, in such cases they were pronounced guilty.

But farther, this great but most wholesome severity of the *Romans*, was tempered with a very great allay of tenderness and care towards the accused offender; as may be seen by the many and most prudent cautions that were observed in it. For,

First, The offence in which such trial was allowed, was to be enormous, and not so little ^c as was to be punished by banishment or pecuniary satisfaction, but either death or corporal punishment was to follow it. *Gomez. var. resol. Tom. 3. ca. 13. nu. 2.*

Secondly, It never could be had where there could be gotten a full and a sufficient proof to condemn without it. For this was to be the last means to bring forth the truth, when ^d all other means did fail. *L. 12. Co. de Question.*

Thirdly, Before a man could be brought to the rack, the offence was to be made out ^e with such an evidence; as in some other States would be sufficient to take away life it self, if the crime were capital: for either it must be proved by one witness who saw it done, or if it could no otherwise be made out than by circumstances, they must be very pregnant and convincing, and such circumstances *Multi in- diciis oneratus, & argumentis penè convictus reus esse debet. Wefenb. parat. dig. eod. nu. 7.*

K

must

^r Gomez. *dict.* must be ^r proved at least by two witnesses. c. 13. nu. 18.

Fourthly, The accused person had all free licence given him to disable the accusers proof, to disparage his witnesses, or to offer any ^s evidence to the contrary; and if the Judge did at last condemn him to be brought to the rack, he ^h might yet appeal.

^s *Si quedam indicia pro reo faciant, quæ elidunt contraria, ita ut amplius ea*

semiplenam probationem non impleant, ad torturam perveniri non debet. Wefenb. *parat. Dig. de quæst. nu. 7. 11.*

^h L. 2. *Dig. de appellat. recipiend.*

ⁱ L. 10. *parag. 3. Dig. de quæst.*

Fifthly, It must be executed with a respect had to the strength or weakness of the body that is to suffer, and no farther than may serve to draw out the truth, *ut moderata rationis temperamenta desiderant*, says ⁱ Arcadius; and, *ut homo saluus sit vel innocentia vel supplicio*; as may stand with all fitting and reasonable moderation; and that he may be preserved either to innocence or to punishment.

Sixthly, The Law notwithstanding gave so little credit to any confession made under such bitter sufferings, because it might be extorted by force, and out of hope to be rid of the present pain, rather than that they were the words of truth, that it would never condemn upon any such confession, except the party accused being redeemed from his pain, and in his full liberty, did again confess the very same thing;

thing; nor then neither, if that which was confessed were more probable to be false than true.

Lastly, The Judge that examined him in such extremities, was directed to bear himself so cautiously, ^k *ut non suggerere interrogato; sed ab eo potius veritatem requirere videatur*; that the truth should rather come freely from himself, than any thing should be suggested to him. He was also diligently to mind with what voice he spake high or low, how freely such confession fell from him, or whether it came with reluctancy; and to enquire what his credit and condition of life had been in the place where he lived. *Plurimum in excutienda veritate*, says ^l *Arcadius, etiam* ^l *L. 1. parag. 21. Dig. eod.* *vox ipsa, & cognitionis subtilis diligentia affert. Nam & ex sermone, & ex eo, qua quis constantia, qua trepidatione quid diceret; vel cujus existimationis quisque in civitate sua est, quadam ad illuminandam veritatem in lucem emergunt.*

These were the cautions which the Roman State did prescribe to be used in this sharp, but as their policy stood (who did not love upon a slender proof to take away the lives of their people) very necessary course of trial by torture; which peaceable and just men could not be offended with, because it was to ^m defend and secure them from the rage and the rapine of vile men: And if evil men did

ⁿ *Quippe cum nescit quidem inter tot crucces & supplicia fontium satis tuta sit innocentia;* says *Grotius, de jur. Bell. lib. 2. ca. 20. groan nu. 12.*

▪ *Dammum
quod quis sua
culpa sentit,
sibi debet non
aliis imputa-
re. Reg. 86.
de reg. jur.
in. 6.*

groan under that severity, they had their desert, and might ⁿ thank themselves. And though it might possibly, howbeit very rarely happen, that some innocent man might wrongfully suffer sometimes under that trial; yet what so perfect or exact a trial can there be devised or thought of, under which that rare accident may not also be? for when we have done all that we can, yet we can still but judge as men.

In defence whereof I have therefore taken the liberty to insist the longer, because once at a publick solemn meeting where the keeping up of this profession came to be considered of, I took notice that this small part of the *Civil Law* was enforced by a worthy Gentleman, *quem honoris causa non nomino*, as a main objection, upon which he would have that whole Law to be quite laid aside; by which rule I know not what Law there is, or ever was, that would stand: and for this reason also, to shew how wise and rational that Law is, even in that which those that do not fully understand it, would so much condemn it for; and how easily in all other matters it may be defended, if so well maintain'd in this. To go on therefore in pursuit of my first design.

The *Civil Law* will have rigour always give place to equity. *Placuit in omnibus rebus precipuam esse justitiæ aequitatisque, quàm*

quàm stricti juris rationem, ° says the Law; ° *L. 8. Co. de*
It is enacted that in all things there ought *judic.*

to be a greater consideration of right and equity than of strict and exact rule. For if every case, when circumstances be clean different, should be measured by one and the same rule, *sub autoritate juris scientiæ*

perniciose aliquando erraretur, says *Paulus P*; *P L. si ser.*

Under pretence of observing Law, we *vum. dig. de*
may at one time or other fall into dange- *verb. oblig.*
rous error. If a man leaves goods in *parag. 3.*

my hands to keep for him, the Law doth strictly enjoin me to restore them when they are demanded: But if afterwards

this man's goods shall be confiscate, as *q L. Tot. Tit. dig. depos.*

being condemn'd for some capital crime; or if it appears that these goods were stolen, and that the true owner comes to claim them, I should err injuriously to keep my self to the strict rule of restoring the goods precisely from whence I had them, and not to deliver them up to the State, or to return them to the true and just owner. *Hæc est bona fides*, says *Tryphoni-*

nus, ° *ut commissam rem recipiat is, qui* *r L. 31. dig.*

dedit. Sed si totius rei equitatem, quæ ex *Depos. pa-*
omnibus personis quæ negotio isto continguntur, *rag. 1.*

impletur, mihi reddenda sunt, à quo, facto
sceleratissimo adempta sunt. Et probo hanc esse
justitiam, quæ suum cuique ita tribuit, ut non
distrabatur ab ullius justiore repetitione; It is honesty to return the goods to him that left them with me. But if the equity of

the whole case be considered, and the persons that are concerned in it, they are better returned to him from whom they were unjustly taken. I allow that justice, says he, which does so render back to every one his own, as that thereby no injury is done to another who has a better right therein.

And from this equity it is that several ways and means are ordained, of restoring men to their first state and condition, from whence in strictness of Law they are fallen: For if a man through threats, or any crafty practice of another, or by his want of full age, or by his being not present, or through some slip or error which a wiser than he might have committed, be fallen into some great mischief, equity in such cases will relieve him against the Law. Hence is it that the

¶ Tot. Tit.
Dig. de integ.
rest.

¶ L. 4. parag.
1. Dig. de eo
quod cert. loc.

¶ Novel. 8.

¶ L. 81. Dig.
pro socio.

¶ Bronch. l.
90. Dig. de
reg. jur.

Law appoints the Judge, *aquitatem semper ante oculos habere*, 'to have equity before his eyes; and that upon the entrance into his office he shall take an oath, *quod in judicando velit aquitatem sequi*, 'that he will judge according to equity; and that all bargains are to be interpreted by equity. * Also sometimes we may depart from the very nature of the contract, and the very words of the will, to follow equity. ¶ Also solemnities and forms of Law, though they ought to be most carefully observed, because they are ordained

as

as rules for all cases; yet upon the ground of manifest equity there may be a deviation from them too. *Et si nihil facile mutandum est ex solennibus, tamen ubi equitas evidens poscit, subveniendum est.*²

² L. 7. Dig.

de integ. rest.

And yet will not the Law allow of the relief of equity in any case, which is specially even with all its circumstances settled by Law, how rigorous soever the determination of the Law be: for written rigour shall be prefer'd before unwritten equity. ² *Clementiores lege judices esse*

non oportet; Judges ought not to be mercifull above that that the Law it self is.

But it lets in equity where the Law is general, and the case in fact is accompanied with such special circumstances, that in all likelihood the Law never took it into consideration; which if it had, it would and must have made an exception in that case; For, as *Aristotle* says, *equitas nihil aliud*

est quam supplementum ejus quod lex intermisit; equity is no more than a providing specially for that which the Law is silent in.

Neither does it allow of a wandering, imaginary or unrestrained equity, but what is either written and authentick from the Law it self, or what is manifest and evident to wise, rational and the best discerning men, (I mean those that are skill'd and well studied in the *Civil Law*, and not your vulgar rational men) by deductions and reasonings from the Law gi-

² L. 12. *pa-*
rag. 1. dig.

Qui & à quib.
man. Vtantis
legis major est
poteftas, quam
equitatis cu-
jus speciem ob-
tendere suæ
cupiditati cui-
que liceret.

Bodin. de
rep. lib. 1.
c. 8.

ven in the like cases. *Non possunt omnes articuli sigillatim aut legibus aut senatusconsultis comprehendere; sed cum in aliqua causa sententia eorum manifesta est, is qui jurisdictioni praeest, ad similia procedere, atque ita jus dicere debet;* Laws and decrees cannot hit every circumstance; but when their determination is certain in any one case, by that the Judge may doe right in other cases that are like it ^b.

^b L. 12. dig. de legib.

As it treats the living with all gentleness and equity, so it extends its humanity and tender consideration to the dead too, and is indulgent to those that lie in their very graves. And therefore it will have the heirs and executors of a deceased person to be so free to bury the dead, and to pay all such funeral respects as are due, that it will not suffer any action to be brought, or any demand to be made of any thing that was owing by him that is dead, by the space of nine days. ^c Nor can any legal process be served upon those that are accompanying the corpse to burial. ^d And so far is it from conniving at the barbarous inhumanity of those, that for money owing by the deceased will arrest and stay the body from burial till payment made, or full security given, that it inflicts a sharp punishment upon such transgressours; for they do not only quite lose that which they labour to recover by so foul an action, but also forfeit

^c Novell. 115. ca. 5.

^d L. 2. § 3. Dig. de in jus vocand.

forfeit as much in value to the deceased's heirs; and a third part of their estate is confiscate, and they make themselves infamous^c.

And if there be such a custome which I have heard is pretended to by some parishes within this Nation, and practised also, that when a dead corpse is carried through towards some farther place of burial, it may be stayed upon the way, and not suffered to proceed till some fee or toll be paid; it is such a custome which the *Civil Law* is against. For that Law expressly provides, *ne corpora aut ossa mortuorum detinerentur aut vexarentur; neve prohiberentur, quo minus via publica transferrentur, aut quò minus sepelirentur*; that the bodies and bones of the dead be not stayed or troubled, nor that any restraint be to hinder their passage along the high-way to and fro, or to obstruct their burial.

¶ And generally without exception either of place or person, says directly, that no such fee or toll shall be paid. ^{¶ L. 38. Dig. de Mort. Infer.} *In nullo quopiam loco vectigat ab aliqua persona pro corporibus ex uno loco in alium translatis preste-* ^{¶ Græc. Cod. de relig. & sumpt. fun. l. 15.} *tur*; No fee shall be paid by any person in any place for the removing of a corpse from one place to another.

And surely if the first ground from whence that custome came were known, we should be willing for Religion sake to lay it down. For our superstitious ancestors

cestours believing that the prayers of the living were usefull to the souls of the dead, were wont as often as they carried forth any dead body to be buried, to stay in every convenient Town through which they went, to receive the prayers of the devout people for the soul of their deceased Brother; In recompence whereof it is probable, that something was in charity bestowed for the poor of that place, or to some other end. Which at first proceeding from bounty, we have no cause to turn it into a duty, especially to pass an indignity upon the dead, and when we bestow not the prayers as they did, nor indeed can think them profitable as they applied them.

Neither is the Law so carefull to conduct the dead quietly to their graves, as it is severe in punishing those that shall disturb their bodies there, or shall demolish or deface their sepulchres. The place where the dead body lies is esteemed Religious, and the injury done to the body itself, or to the monument thereof, is accounted no less than sacrilege^h.

^h *Co. De sepulch. viol.*

If it be done riotously and with Arms, the crime is capital; if without, it is to be considered whether the body be pull'd out of the grave, and then it is capital to those of the meaner sort, but others of better rank are banished, or condemned to work in the Mines. But if the sepulchre be
only

onely demolished or defaced, a penalty is paid to the Exchequer, and good reparation given to the next heirs, and divers other punishments besides inflicted ⁱ.

ⁱ *Tot. Tit. Dig.*
& Cod. de sepulch. viol.

Nay, though the body be interr'd in another man's private ground, though it does not allow of the act, but will order the body to be removed, or the value thereof to be paid to the owner of the soil, yet it will not suffer the owner of the ground, of his own head to unbury or take away the body, *propter reverentiam manium, & quia corpus sepultum non est inquietandum*; for the honour due to the Ghosts of the dead, and because dead men once interr'd ought not to be disturb'd; but either the Prince or the chief Priest must give authority or warrant for the same ^k. Finally, the debt contracted by the deceased in the time of his sickness or about his burial, shall be paid before all other debts whatsoever ^l.

^k *L. 8. 39.*
Dig. relig. & sumpt. fun.

^l *L. pen. Dig.*
de relig. & sumpt. fun. l. 3.
Co. eod.

In all its constitutions it opposeth and setteth it self against the oppression of great ones, and hateth that wrong that comes from the potency or greatness of any person. If a person of honour shall forcibly carry away a Virgin, or invade the possession of another, he shall be tried by the ordinary Judge of the place where he offendeth, and not be allowed any higher or more noble Judge, which else he may claim to have: for *omnem hujusmodi*

^m L. Co. Ubi
senat. vel
clariss.

ⁿ L. 47. Dig.
de ritu nupt.

^o L. 1. Co. Ne
liceat potent.
patrocin.

^p Tot. Tit. Co.
Ne fiscus vel
resp. procura-
tion.

^q L. 6. Co. un-
de vi.

^r L. 1. Co. Ne
fiscus vel resp.

huiusmodi honorem reatus excludit, says the Text of the Law; ^m His guilt renders him incapable of any such Honourable Privilege, *Neque honos ei servatur qui se in tantum scelus deduxit*; ⁿ Honour is no protection for him that hath stained it with such an odious crime.

It will not allow persons of great power or high place to interest themselves in the controversies or litigious estates of others, neither by soliciting them in Court, nor having their names used to countenance them; *ne tenuiores importunis potentium intercessionibus opprimantur*, says the Text; ^o that is, lest might should bear down and be too hard for right. Nay, it will not admit either the publick Exchequer or the Commonwealth, upon any pretence of debt, gift, or assignment to them made, to lend their name or patronage for the asserting of others rights. ^p *Ne inde injuriarum nascatur occasio, unde jura nascuntur*; ^q that is, lest they that should doe most right, should be the occasion of doing the greatest wrong.

And it is remarkable, how disdainning the expressions of the Law are in that particular, and yet but such as upon the like occasion are frequent and common in the Law every where. Petition being made to *Gordian* the Emperour, that he would suffer it, his answer was, *Contra juris rationem desideras*; ^r The request was opposite

opposite to right reason. The same Emperour being asked again the same thing, said, *Hoc temporum meorum disciplina non patitur. Unde jus tuum, sit quod tibi competit, citra invidiam fisci mei tueri solenniter cura*; [†] that is, it agrees not with my fashion or [†] L.2. Co.eod. government so to doe. If therefore you have a right, prosecute it in your own name, without drawing into odium my Exchequer. The Emperours *Dioclesian* and *Maximilian* to the same thing peremptorily say, *Abhorret à seculo nostro*; [†] It was [†] L.3. Co.eod. a thing that he and all of his time abhorred: And again, [†] that it was *contra seculi sui tranquillitatem*; [†] It would be an inlet [†] L.4. Co.eod. to a general distemper to permit it.

It will not endure any fraudulent, fallacious, or deceitfull dealing. ^{*} If a man ^{*} Tot. Tit. Dig. de Dol. mal. does wilfully alien to defraud his adversary, his act is vain; for in the eye of the Law he is taken to be in possession still. *Qui dolo desierit possidere, pro possidente damnatur; quia pro possessione dolus est.* [†] Especially it hates deceit most in those, [†] L.131. Dig. de reg. jur. whom it is most forward to relieve when they are deceived. The *Civil Law* allows not a woman a capacity to be surety or to be bound for others, though she might contract for her self, *propter imbecillitatem sexus*, being prone to be drawn in and to be wrought upon; ^z Which restraint did bind her from being bound for her own husband. ^a But if when she knows her ^a L.2. Dig. eod. privilege

privilege, and will cunningly dissemble it, and offer to be bound notwithstanding, and the creditour is such a one as may be justly ignorant of the Law in that particular ; or if she presents her self in mans apparel, the Law will not relieve her, but she remains subject to action : For, *ita de-
mum mulieribus subvenitur, si non callide sint
versatæ : Infirmitas fæminarum, non calliditas;*

^b D. l. 2. pa-
rag. 3.

auxilium meruit ; ^b It is their ignorance and weakness that the Law favours, and not their craft and subtilty. So no act is

^c Tot. Tit. Dig.
de minor.

binding to him that is under age. ^c But if he shall *fallaci majoris ætatis mendacio aliquem decipere*, say and pretend to him that deals with him that he is of full age when he is not, in that case he stands obliged and is remediless. *Nam errantibus, non sal-*
^a L. 2. Co si
min. se major.
dixer.

lentibus, publica jura subveniunt ; ^d It is error and imprudence, and not fraud, that the Law will succour.

Ingratitude is so odious in the Civil Law, that if a slave that has been manumised shall bear himself unthankfull towards his Master, or if a son shall recompence the benefit of being quit of his fathers power and command, with some injurious act or office against his father, they may both for their ingratitude be brought into their former yoke again. ^e And generally, if I have out of my free bounty bestowed any thing upon another, if he shall attempt to betray my life or estate to mischief, or pass upon

^e Wesenb. Pa-
rat. Dig. de ob-
sequ. parent.
et patron.
præstand.

upon me any weighty injury, I need not suffer my bounty to remain with so unworthy a person, but may recall it again from him; ^f *Cum magis in eos collata liberalitas ad obsequium eos inclinare deberet, quam ad insolentiam erigere*; ^g Since bounty ought to invite men to be rather obsequious than insolent. Howbeit my heir, if I die, shall not sue to recover it. *Etenim si ipse qui hoc passus est, tacuerit, silentium ejus maneat semper*, says the Law: ^h If I against whom the ingratitude was committed did not complain, let it be buried in silence for ever.

The elegance wherewith it has expressed its detestation and severity against the odious and unnatural sin of men carnally mixing with one another, is very remarkable: *Cum vir nubit in foeminam viris porrecturam, quid cupiatur, ubi sexus perdidit locum? ubi scelus est id, quod non proficit, scire? Ubi Venus mutatur in alteram formam? Ubi amor quaeritur, nec videtur? Subemus insurgere leges, armari jura gladio ultore, ut exquisitis poenis subdantur infames, qui sunt vel futuri sunt rei.* ⁱ The state and quality of the matter requires me not to translate the words, though most elegant.

The order that the *Civil Law* has settled for the sharing of a mans estate who dies intestate, is very natural, just and rational. It sets no difference between land and goods, nor between eldest and youngest,

nor

^f L. 10. Co.
De revocand.
Donat.
^g L. 1. Co. eod.

^h D. l. 10.

ⁱ L. 31. Co.
ad l. Jul. de
Adult.

nor male and female, but divides the whole equally amongst them ; yet it has a respect to distance and propinquity of degrees, and considers the whole blood and the half after a different manner. It calls first children : if they fail, then parents ; if they fail too, then the next collateral kindred. * And when I say that

* *Novel. 118. de hered. ab intest. venient. in princ.*

† *Parag. si plures Inst. de legit. agnat. succes.*

children shall succeed in the first place, I do thereby exclude and bar Grand-children, so long as their parents are alive: for *proximior in gradu semper remotiorem excludit* ; † the nearer in degree shuts out

those that are farther off. Yet if there were divers children at first, and one of them is dead, who has left children, such Children and Grand-children shall succeed together, but they shall not all share alike: for as the children amongst themselves shall partake equally ; so the children of him that is dead, if there be never so many of them, yet all representing their father and coming under his right, they shall all have but that portion which he should have had if he had lived. † And this the

‡ *Parag. cum filius Inst. De hered. agnat. ab intest. succes.*

Law calls a succession in *stirpes* ; there being no consideration had of their number, but of their stocks onely. And though all the children of the first degree should die, each of them leaving their several children, be the number equal or unequal ; yet still the children of each child shall have but the fathers or mothers part ;

a for

for still they succeed in right of their ancestor, and not in any right of their own.

When children and all of the descendent line do fail, the Law does not only admit the father and mother in the next place to succeed equally; but if they fail, the next degree above them in the ascendent line, as Grandfather and Grandmother, shall come in to inherit. And if there be both Grandfather and Grandmother by the fathers side, and Grandfather and Grandmother by the mothers side, the estate shall be divided into two equal parts; the Grandfather and Grandmother by the fathers side to have one, and the Grandfather and Grandmother by the mothers side to have the other; and though there be but one of one side, and two of the other, yet the division must be the same.

Parag. fin. Inst. eod.

Wesent. Parat. dig. Unde cognat.

Ca. 2. dist. Novel. 118.

But if the person that is dead intestate, left Parents in the ascendent line, and near kindred in the collateral line, as brothers and sisters; the one shall not exclude the other, but they shall all be admitted together, to divide the estate equally, every person carrying away an equal share; and if there be children of a brother that is dead, they shall come in too, but no farther, than to carry away their fathers part. Howbeit, they must be brothers or sisters of the whole blood to him that is dead, who would come in with the parents: for brothers or sisters of

D. cap. 2.

Schneidw. Inst. de hered. qua ab int. Tit. de secund. Ordin. succed.

L

the l. nu. 29.

* Schneidw.
loc. citat. nu.
30.

the half bloud shall not concur with
f them.

Where the descendent and ascendent line do both fail, if there be brothers alone, they have all alike; but if there be children of a brother that is dead concurring with them, they must yield to the children their fathers part. But if there be brothers and sisters children onely the brothers and sisters being all dead, though there be never so many of one brother, and but one of another, and two of one sister and but one of another, yet all these brothers and sisters children standing alone, how unequal soever they be in number, yet they shall all share equally, not each stock having what their fathers should have had, but every person having his equal part in the whole: * And this the Law calls *successio in capita*, a succession by the poll. The reason why they succeed thus differently when they are alone, from that which they do when they concur with brothers and sisters to the deceased, is, because here they derive no right from their ancestour, but succeed by a right of their own, being now the deceased's next of kin: whereas in the other case they succeed by way of representation, and in the right of their parent onely.

But if brothers and sisters and their children do both fail, it is a certain and uncontrolled rule, That whosoever is next

in degree to him that is dead, after these in the collateral line, bars and shuts out all of any degree that is farther off. ^u For the right of representation reaches no farther, nor to any other than to brothers children in the collateral line. ^{*} Wherefore if a man dies leaving Uncles and Aunts both by father and mother, they are all admitted to have equal shares; but no children of any Uncle or Aunt that is dead, shall be admitted to come in with them. And so much the *Civil Law* prefers the whole blood before the half, that if a man dies, leaving Brothers of the whole blood, and Brothers of the half, the whole blood onely are admitted, the half being quite excluded.

^v Nay farther, a Brothers son of the whole blood shall carry away the estate from the Brother of the half. But if there be no Brothers or Brothers children of the whole blood, then the Brothers and Sisters of the half and their children are let in, to exclude remoter kindred. ^z Howbeit though the being of the half blood be a bar to succession in Brothers and Brothers children, yet does it bar no other farther off than they. If therefore a man dies leaving two Uncles, the one Brother of the whole blood to his father, the other Brother of the half, the whole blood here shall not exclude the half, but they shall both suc-

^v *Auth. post. fratres. Co. de legitim. hered.*

^z *Ga. 3. dist. Novel. 118.*

^v *Auth. Cessante eo De legitim. hered.*

^z *Auth. post fratres autem.*

ceed alike. For in the collateral line, after Brothers and Brothers children, *solum consideratur proximitas & paritas graduum, non duplex vinculum conjunctionis*; the nearness in degree is onely to be respected, and not the blood. Wherefore they being both in an equal degree, they are to be dealt withall in this point of succession equally. ^a

^a *Schneidw loc. citat. Tit. De tertio ord. succed. nu. 34.*

^b *Paul. de castr. in l. maritus. 21. co. de procurat.*

^c *l. 4. co. solut. matrimon.*

As for the wife, because under the Roman state she might have a three-fold patrimony of her own; First her dower, secondly, the goods that she brought in marriage to her husband over and above, call'd *bona Paraphernalia*, or *bona extra dotem*; and thirdly goods or estate that she kept in her own hands, which never came to the hands of her husband: ^b And because by the course of the *Civil Law*, both her dower and the goods that she brought besides over and above, her husband being dead, came back to her again, the husband having but the use of them during life; ^c therefore where there was either children or kindred, it did not admit the wife to have any part or portion in the husband's estate, but did leave her to enjoy her own.

But if the case were such, that she had no portion to bring in marriage, or had but a slender one, and that she has nothing or not enough of her own to subsist with, nor otherwise be provided for by

by her husband, the Law does then allow her a fourth part out of her husbands estate, if there be three children or under; but if there be more, she shall then have an equal share with them for her life. But if there be kindred onely, and no children, or if the children that be, be not her children, but children of another marriage, she shall have the property thereof for ever.^d

^d *Auth. præterea.co.Unde vir & Uxor: Schneidw.loc. citat. Tit. De succes. inter vir. & ux.nu. 14.*

But there is nothing that the *Civil Law* is more strict and solicitous in, than to keep men fast to such promises, covenants, and free gifts that they have made to others, though made never so liberally and freely, and without any consideration at all. *Nihil ita fidei congruit huma-*

ne, quàm ea quæ placuerant, custodiri;^e Nothing suits better with common honesty, than that those things which have been once assented unto should be observed. Which it will have binding and obligatory, though any right or property that a man has, be thereby passed and conveyed away. *Nihil tam conveniens*

^e *l. 20. Co. De Transact.*

est naturali equitati, quàm voluntatem domini volentis rem suam in alium transferri, ratam haberi;^f Nothing does nearer approach unto natural equity, than that the mind of any man who once puts over any thing that he has to another, should stand of force. And the Law is the same, when a man without any asking does of

^f *Parag. 1. Inst. De verb. obligat.*

§ l. 35. parag.
ult. Co. de Do-
nat.

himself freely give any thing to another, though he does not presently part with the possession. § The reason that is gi-

ven by the Law is, *Cum in arbitrio cuius-
cunque sit hoc facere quod instituit, oportet e-
um vel minimè ad hoc proficere, vel cum venire
ad hoc properaverit, non quibusdam excogi-
tatis artibus suum propositum defraudare, tan-
tàmque indevolutionem quibusdam quasi legiti-
mis velamentis protegere*; When it is in e-
very man's free power to doe as he purpo-
ses at first, he ought either not to offer it
at all, or when he has gone so far as to
pass his word, he should not seek by any
devised artifices to slip from his first in-
tention, or to prop up so much unworthi-
ness with any fair or colourable preten-
ces. Onely a free giver has this favour
shewed him, that he shall not be urged
to make good his word any farther, than
*in quantum facere potest, habita ratione ne-
geat*, so far as he is able to perform,
and not want himself. ^b Nor shall he be

l. 28. Dig. de
reg. jur.

so severely dealt with, as one that has
debts to pay. *Pinguis donatori succurrere
debemus, quàm ei qui verum debitum persol-
vere compellitur; ne liberalitate sua inops
fieri periclitetur*, says the Law; ^c We
must lend a more favourable hand to a
free benefactor, than to one that is to
pay a just debt; lest a man's freeness
should expose him to the danger of ex-
treme want and penury. And albeit it
be

l. 49, 50.
Dig. De re ju-
dic.

be a rule in the *Civil Law*, that a bare promise or compact, call'd *Nudum Pactum*, is not obligatory, nor shall give any cause of action: * Yet when there is discerned a seriousness and an advised purpose in the promiser, so that he does not do it suddenly, and *ad captandam benevolentiam*, to get favour onely; or if it be manifest, that he does it out of pure liberality, the want of recompence or consideration will not make it *Nudum Pactum*; but that an action shall arise upon it, and he shall be bound to perform it. Or if such promise or compact be put into writing, which may argue it to be serious and deliberate; the defect of a valuable consideration will not make it to be a *Nudum Pactum*, but that it shall bind, and he that made it shall be enjoyned to perform it also, though he received nothing at all in recompence for it. ¹

¹ l. 45. Dig.
de pact.

When the *Civil Law* gives way to two that are indebted each to other, that when either sues, the other may plead in bar the debt which the complainant owes him; which if it be equal, it strikes it off wholly, or lessens it if it be under, and so by discounting, a mutual discharge arises without any money paid; or not so much as is demanded; who sees not that this part of the *Civil Law* is established upon so much natural equity and reason, that it had been a Law of it self,

¹ Mästert. de
just. Roman.
Leg. lib. 1. c. q.
31, 33.

if the Romans had not made it so, and ought to be of force every where throughout the World, it is so full of pure justice and reason? *Interest enim nostra potius non*

^m l. 3 Dig. de compensat.

solvere quam solutum repetere; ^m It is an advantage rather not to pay at all, than to pay once, and be put to demand the same again. And, *dolo facit qui petit id quod max redditurus est.* ⁿ His intent

ⁿ l. in condemnatione. parag. 3. Dig. de reg. jur.

must needs be fraudulent, that will exact that which he must render again to him from whom he receives it. Besides, he that will rightly ask his due, must yield to another what is due to him. And albeit it may be said, that he may also sue to recover that which is owing unto him; yet, *frustra fit per plura quod fieri potest per pauciora;* ^o A second Action is

^o l. 10. Co. De Jud. c.

a needless trouble and charge, which may be brought to an end by one. Stoppage therefore is unquestionably the most natural, equal, and easie way of payment; provided, that the debt that is set against the debt demanded, be of the same kind, and clear without dispute; which if it be, it may be pleaded even after judgment, to hinder execution. ^p Yet it will

^p Richard. in Rubr. Co. de compensat.

not suffer me to plead a debt against him that has put into my hands a sum of money in trust to keep for him, because my faithfulness and truth was here relied upon: nor against the Exchequer that demands tribute or custome, for that the safety

safety of the people is therein concerned. [¶]

The *Romans* did so throughly see the necessity that lay upon men to perform mutual offices and kindneses each to other, that to encourage men the more to pay these reciprocal duties, so necessary to each others common being, the scope of their Laws tended to secure all men from sustaining any prejudice by being officious or active for the benefit of other men. If therefore in my friends absence I expend money, or contract a debt upon my self to accommodate and improve his business, though I did it without his privacy or knowledge, the *Civil Law* will see all that I have laid out shall be restored me, and I will compell him to save me harmless, where either I have or can possibly suffer detriment for his sake. For, *sicut equum est*, says *Gaius*, *negotiorum gestorem actus sui rationem reddere, & eo nomine condemnari, quicquid vel non ut oportuit gessit, vel ex his negotiis retinet: ita ex diverso iustum est, si utiliter gessit, prestari ei, quicquid eo nomine vel abest ei, vel absuturum est*; [¶] As it is but fitting, when I undertake to act in another man's business, I should give an account for what I doe, and answer for any thing I have done amiss therein, and render unto him such profits as his affairs and goods have yielded: So on the other side it is but just, where I have

[¶] Parag. 30.
Inst. de act. l. 3.
Co. de compensat.

[¶] l. 1. Dig. de negot. gest.

have served him with success and advantage, that there he should reimburse me all that I have usefully expended, and free me of all present and future prejudice whatsoever. Hence is it, that if I pay another man's debt with my own money; or free from captivity anothers son or such near kinsman, whom nature would oblige him to redeem; or if being a Physician I attend and prosecute the cure and recovery of anothers servant that is sick or wounded: in none of these cases will the Law suffer me to be a loser in any measure; for what cost I have been at, or whatsoever I have disbursed shall be allowed me: *Iniquum est*, says Gaius, *officium suum alicui esse damnosum*; [†] It is unreasonable, that a man for his courtesie and goodness should reap a prejudice. Upon the equity hereof is that proceeding in the Admiralty Court clearly justified, whereby, if a Ship being set upon by Pyrates or by enemies, shall be rescued by anothers Ship seasonably coming in to her rescue; it charges the Ship that is thus redeemed with salvage money to the other that did so endanger her self, to preserve her; that recompence being but in lieu of all damages thereby sustained, and for future encouragement to others to fight in the defence of those that they see assailed hereafter. Upon the same equity is it, that when a Ship is in danger

[†] l. 7. Dig. Testam. quemadmodum aper.

to be cast away through a raging tempest, if to lighten the Ship, some of the heaviest goods belonging to others be thrown overboard, and thereby the Ship and the rest of the goods come safe home, the loss is made common and reparable by the whole. *Aequissimum enim est*, says Paulus, *commune detrimentum fieri eorum, qui propter amissas res aliorum consecuti sunt in merces suas salvas habere*; * It is most equitable, that their wares should joyn to make up that loss, which was the onely means whereby they were preserved.

* l. 2. Dig. Ad leg. Rhod.

In like manner, though goods taken at Sea by Pyrates from the true owners, may be challenged and regained from any hands, where ever they shall be found and met with (though it is otherwise in goods taken by an enemy in a just and open war) yet if a man shall expend his own money to redeem them out of the Pyrates hands, not for his own use, or to make a good bargain for himself, but with an intent to bring them home to their true owner; in this case, if the owner will have them, he must first lay down the purchase money. " Nay, sometimes the Law will enjoin a man to pay for that which he had got before. For if three be taken prisoners in war, and one be permitted to go home to procure money to pay for the ransoming of them all, and a condition added, that if he
that

* l. 6. Dig. de Captiv. & postlim. revers. l. 2. parag. 3. Dig. ad leg. Rhod.

that is let go returns not, the two that are left behind shall stand ingaged for his ranfome as well as for their own; in this case what money soever they lay down for him, he is bound to repay them, though he had gotten his liberty before.

* l. 21. Dig. de
Negot. gest.

* For the Law will not suffer a man to be damnified by any act which is done usefully in contemplation of another.

And herein the Law does not so much look upon the success or sequel, as the good will and probable undertaking. And therefore if I should fence or cast a wall about another man's Island to keep it from overflowing, and it is overflown notwithstanding; or if I bestow pains and cost to cure another man's child or servant, and he dies, yet the Law will see me satisfied. *Nam sufficit, si utiliter gessi, etsi effectum non habuit negotium*, says

† l. 10. Dig.
de negot. gest.

Ulpian; † It is sufficient that I did what was to be done, though the intended effect did not ensue.

But here some caution and wariness must be used. For he that thus acteth for another, must be sure that he does no more than he that he acteth for would have done for himself, neither must he expend any more than is profitable and necessary, and he can bear.

‡ l. 10. parag.
1. Dig. eod.
§ l. ult. Co. eod.

‡ Also he must not act after any countermand be once sent him, or that he be once bidden to desist, § For in neither

neither of these cases will the Law help him.

Farther, if he be a father, or other of most near relation, that deals for the benefit and in the concernments of such an one, as the Law may possibly presume he does it rather to testifie his natural affection towards him, than to demand any thing of him for the same; I say, if there be any such proximity or nearness, and yet an eye to future satisfaction, he must declare and make protestation, that it is done with that intent, and not *donandi animo*, not out of any mind to bestow it freely, but to be allowed for the same; else the Law will strike it out upon the score of affection and natural obligation. And so did *Alexander Severus* declare to Mother *Herennia*, who when she had fed and maintained at her Table her Children, and laid out money besides for their other uses; when they came of age, she demanded satisfaction of all from them, but being denied it, she complained to the Emperour, who made her this answer, *Alimenta quidem quæ filiis tuis præstitisti, tibi reddi non justa ratione postulas; cum id exigente materna pietate feceris. Si quid autem in rebus eorum utiliter & probabili more impendisti, si non & hoc materna liberalitate sed recipiendi animo fecisse te ostenderis, negotiorum gestorum actione id consequi potes.* ^b *L. II. Co. eod.*

Thou hast no just reason to demand payment

ment for that alimony and sustenance which thou didst afford thy children, for very natural piety did require it of thee. But if thou hast usefully and in a probable hope to advantage them, expended also money about their business; if thou canst make it good that thou didst it not out of a free mind, nor merely as a Mother, but with an expectation to be reimbursed thereof by thy children, the Law will enforce them to pay it thee back again.

Lastly, he that will voluntarily and of himself, being not commissioned, act in anothers business, if he intends to ground any demand upon it, he must be sure, not onely to think and intend a benefit or advantage to him whom he is about to serve, but it must be really so. For let him think it never so beneficial, and with it never so much, yet if it be not so indeed, the loss will be his; and he can challenge no satisfaction for what he does or expendeth. *Ut enim eventum non spectamus, says Ulpian, negativum debet utiliter esse ceptum;* ^c Though we value not the success, yet it is requisite that it should be evidently usefull or necessary when it is first undertaken.

^c L. 10. parag. 1. Dig. eod.

Lastly, (not to sail any longer in an Ocean so vast and infinite, having given instances enough to measure the rest of the Law by, *tanquam ex pede Herculem*) though

though it is the proper work of every Law that is made, to declare to the people what things they ought to doe, and from what they must abstain, and wherein they may take their full freedom; ^d yet no Law has ever done it so fully and perfectly as this has done. For Princes, Rulers, Councillours of State, Judges, subordinate Magistrates, Advocates and Clients, Proctours, Registers and Notaries, Masters of families, Husbands and Wives, Children and Servants, Masters and Scholars, Tutours and Pupils, Merchants and Factours, Buyers and Sellers, Letters and Hirers, Borrowers and Lenders, Officers and Souldiers, open Enemies as well as Allies and Confederates, Ambassadours and Nuntios, Conquerours and Conquered, Owners, Masters, and Captains of Ships, Pilots, Mariners and Passengers, Aliens, and Natives, Fiduciaries, Mediators, Substitutes; and lastly, all sorts of people of what age, degree, or condition soever they be, may reade their truest duties in this Learning, and be directed how to order and demean themselves aright in their severall offices and functions: So that when the learning of this Law is thus universal, running through the severall negotiations and matters of intercourse between Man and Man, Nation and Nation, and having a resolution ready for all such questions as arise upon them; and is so rational

Legis virtus est imperare, vetare, permittere, punire. l. 7. Dig. de legib.

nal withall, that its decisions are rather the strong enforcements of reason, than any commands of will; it ought to be no matter of wonder to us, that it has found so much credit and authority with Christian Nations, as to make it the rule to end their greatest Controversies.

The End of the first Book.

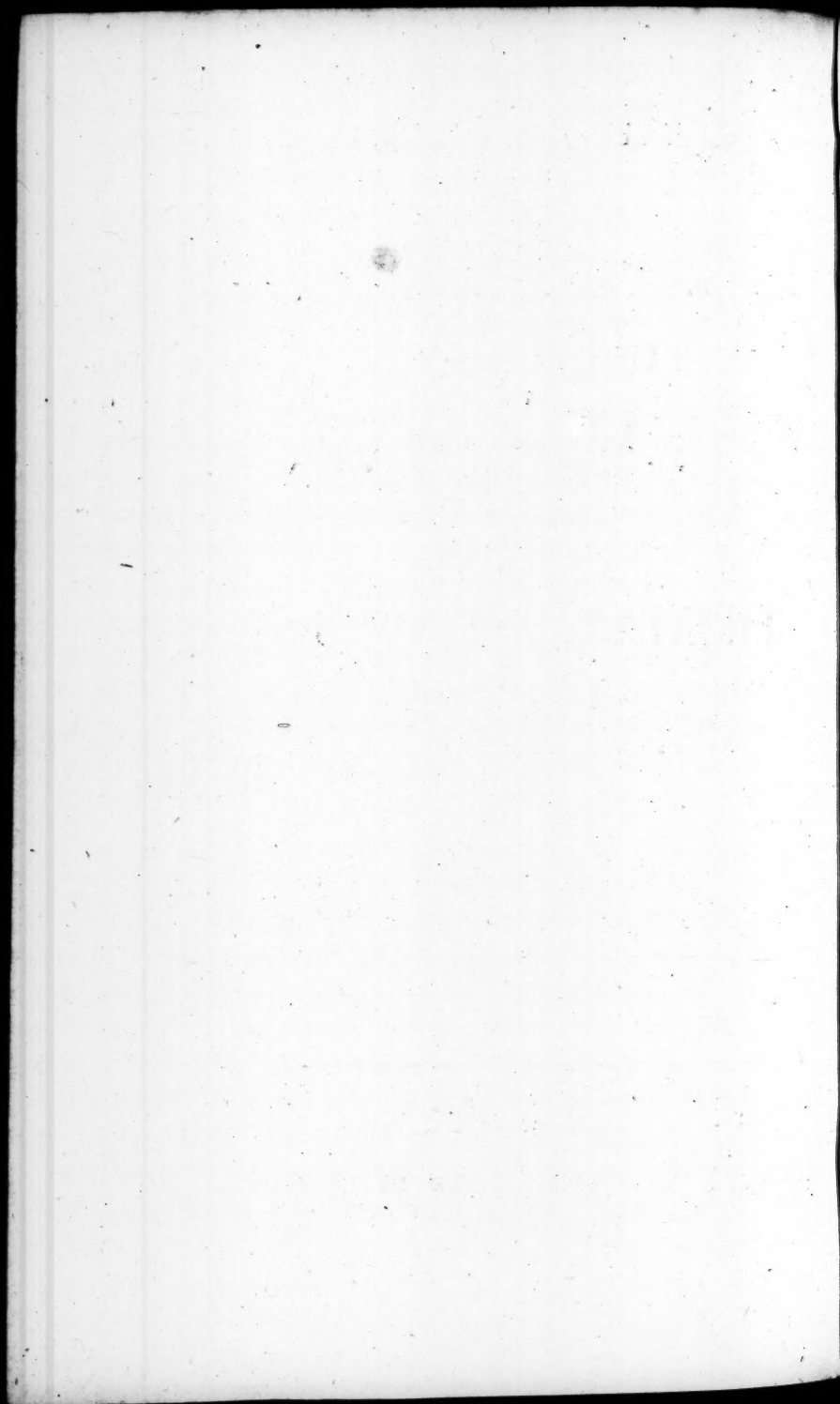
LEX

LEX LEGVM:
OR,
THE EXCELLENCY
Of the Roman
CIVIL LAW,
Above all other
HUMANE LAWS
WHATSOEVER.

The Second Part.

L O N D O N,

Printed for *Richard Green* in *Cam-*
bridge, 1685.



LEX LEGVM:
 OR,
 THE EXCELLENCY
 Of the Roman
CIVIL LAW,
 Above all other
HUMANE LAWS
WHATSOEVER.

CHAP. I.

*That the greatness and splendour of the
 Roman Empire does evidence the
 singular vertue of the Law it self,
 to which, as to its proper cause, it
 may be ascribed.*

Albeit it be praise sufficient for the
Roman Civil Law, that it hath
 more of natural equity and pure
 reason in it than any other Law of Man;
 and that more need not be said, to divert

a Nation or people from throwing it out of their Territories, or disesteeming it, than that they may thereby seem to abandon their own reason, and stifle the very dictates of nature, and even stop up that fountain from whence all their own particular Laws were at first derived (for, *lex*

Romanorum legum omnium Mater nuncupatur,

• *Addit ad*
• *Capitul. Lud.*
• *Imper. ca. 4.*
• *in Cod. leg.*
• *Antiqu.*

• the *Roman Law* is called the Mother of all Laws that have since been made:) Yet because there are many other grounds upon which it may be yet farther extoll'd and set up above other Laws, I think I cannot spend time and pains better than to set them down, especially when I see every thing is laid hold on to cry that profection down.

And surely if the dispensation of right justice be a principal means to make a State glorious and flourishing, this Law must needs surpass in excellency all other Laws, by how much the *Roman State*, which was all along carried on by that Law, did in greatness exceed, and in splendour out-shine all other States and Empires that have yet been. Touching which the *Roman story* every where gives us to understand, that the *Roman State* in process of time grew so large in Dominion and Power, that it spread it self almost over the whole World, there being few Nations which were not brought under its rule and government;

vernment; and indeed was esteemed the common countrey of all men, and the Centre of the whole earth. *Tanta erant Romanorum vires, ut Asia, Africa, & maxima Europæ parte subactis, iisdem ferme quibus Solis cursus metis, imperium suum finirent,* says *Loccenius*; ^b the potency of the Ro- ^b *Period. Im-*
mans was grown to be such, that *Asia*, ^{per. lib. 4.}
Africa, and the greatest part of *Europe* be- ^{ca. 5.}
ing Conquered, the Sun and the Empire did almost run the same race.

It maintained intercourse of Trade, and held correspondence with all other Nations, of what sort, constitution and language soever: It was the common ^c Judge ^c *Nihil prin-*
and Umpire to arbitrate the differences of *cipe dignius,*
other Princes and People: It was the seat *nihil magis*
of Learning, and receptacle of all learned *optandum,*
men: It continued flourishing many hun- *quàm dissidi-*
dreds of years; during all which time it *orum ac bello-*
dealt in affairs of the greatest consequence *rum inter po-*
and variety, and did increase in great plen- *pulos arbi-*
ty and abundance of all things; and *trum cieri;*
whatsoever was in any kind rare, curious, *ut olim Sena-*
or exquisite in any part of the earth be- *tus Populus-*
sides, it was brought thither. And there- *que Romanus*
fore *Athenæus* has not doubted to call *propter sum-*
Rome in exprefs terms, *ἐμπόριον ἢ ἀνακτορεῖον;* *nam virtutis*
the Abridgment and Summary of the *quàm de se ip-*
whole World; as if *Rome* wanted nothing *se concitaret*
which all the other parts of the earth af- *opinionem.* *Bo-*
forded; or as if we ought to esteem it *din. de rep.*
Orbem in urbe, the wide World confined *lib. 5. ca. 6.*
in that one City.

In congruity therefore of reason must it be concluded, that a Nation in all other things so much superiour unto others, must also have Laws and rules of conduct proportionable; else could they never have brought to pass so great and glorious things as they did: For by the benefit of wholesome Laws and prudent order is it, that great atchievements are accomplished in a Common-wealth, and such mighty works effected. Hereupon Tully contemplating the Laws of Rome as well as their riches, does declare, *tantam sapientiam majoribus suis in jure constituendo fuisse, quanta fuit in his tantis opibus imperii comparandis*; they shewed as great wisdom in framing their Laws, as they did in getting the infinite wealth which their State then had.

And well it is observed and delivered by many later writers, that in the Roman Empire, the greatness thereof is rather to be imputed and ascribed to the wisdom of their Laws and Government, than to their arms and valour. And although in Vegetius his opinion, *Disciplina militaris acriter retenta principatum terrarum Romano imperio peperit*, Their strict holding to the rules of Martial discipline made the Romans Masters of the world; yet Sulpitius the Poet will not give it to that onely, for in his judgment,

*Duo sunt quibus extulit ingens
Roma caput, virtus belli, & sapientia Pacis.*

it was their wise government in peace, as well as their success in war that did so highly advance this City; for what their arms did get, their Laws did keep, according to the saying of Florus, *Viribus parantur provincia, jure retinentur.* Thomas Aquinas ^d says, that though they got the Empire first by injustice, rapine, and blood-shed, yet they did deserve to hold it and to have it established upon them, for the good Laws they had ordained.

^d Lib. 3. de
Regim. Prin-
cip. ca. 5.

Saint Austin ^e designing to set down how it came to pass that God did so exalt and enlarge the Roman Empire, and what actions were the cause thereof, imputes it to their virtues, and to their heroick and gallant minds; to their prudence and honesty, rather than to their strength and power. For he brings in Cato speaking to the Romans of his own time, that had much degenerated from their Ancestours: Think not, saith he, that our Ancestry brought the City into this height by arms; if it were so, we should make it far more admirable than ever, for we have greater plenty and abundance of men, more confederates, a greater store also of arms and horses than they had. But they had other means

^e Lib. 5. De
civit. Dei ca.
12.

which we want, industry at home, equity abroad, freedom in consultation, and purity of minds in all men, free from lust and enormity: For these we have gotten riot and avarice, publick beggary and private wealth: riches we praise, and sloth we follow: good and bad are now undistinguished, ambition devouring all the rewards due to vertue. Nor wonder at it, when each one patcheth up a private estate; when you serve your lusts at home, and your profit and partiality here in the Senate. This is it that lays the State open to all incursion of others. Again, in the same place he says of them, That they were greedy of praise, and bountifull of their purses; they loved glory and wealth honestly gotten; Honour they dearly affected, but through vertue, offering willingly both their lives and their estates for renown. The zealous desire of this one thing made them set aside all other inordinate affections whatsoever; and hence they desired to keep their Countrey first in freedom, and then in Sovereignty; because they saw how baseness went with servitude, and glory with dominion. ^f

* *Amore primis libertatis, post etiam dominationis, & cupiditate laudis & gloria multa magna fecerunt.*

And then concludes; wherefore, saith he, whereas the Monarchies of the East had been a long time glorious, God resolved to erect one now in the West also, which although it were after them in time, yet should

should be before them in greatness and dignity. And this he left in the hands of such men, (which he supposes were not the generality of the people but some few onely, but those very good and gallant men) to punish the loud and crying guilt of other Nations. And those men were such, as for honour and dominations sake would have an absolute care of their Countrey, whence they received this honour; and would not stick to lay down their own lives for their fellows, suppressing covetousness and all other vices onely with the desire of honour &c.

And then in the fifteenth Chapter of the same Book, speaking still of the Romans, and the course they took in the prudent conduct of their affairs, he closeth thus most excellently, *His omnibus artibus tanquam vera via nisi sunt ad honores, imperium, gloriam: honorati sunt in omnibus ferè gentibus: imperii sui leges imposuerunt multis gentibus: hodièq; literis & historia gloriosi sunt penè in omnibus gentibus. Non est quòd de summi & veri Dei justitia conquerantur; perceperunt mercedem suam;* By these Arts as by sure steps they climbed to honour, rule, glory: their name was magnified almost in all Nations, they sent out their Laws to many Nations, and they were obeyed: there is almost no Nation, but their Histories and writings mention them. No reason have they to murmur

Pro isto uno vitio, id est, amore laudis, pecunie cupiditatem, & multa alia vitia corruptes.

at

^h *Terrenam gloriam excellentissimi imperii Deus concessit, ut redderetur merces bonis artibus eorum, id est, virtutibus, quibus ad tantam gloriam pervenire nitabantur.*

at the justice of the true and high God; they have had their reward ^h.

Although therefore the *Romans* in their gallant and heroick minds they bore, did propose to themselves no other end but their temporal honour and earthly greatness, not once thinking of doing honour to the great God, nor looking towards any heavenly felicity that might follow after this life ended, having not yet been taught or heard of any such thing: yet it must be acknowledg'd that the effects which have flow'd from their desire of glory and rule, have been singular and admirable; amongst which their just, rational, and honest Laws do deserve to make their memory still famous amongst men, because so much use has been made thereof ever since, in the governing of so many States, Empires and people. And well did some of the ancient Fathers of the Church, as also some of our later Divines observe, that without doubt God did therefore indue the *Romans* with such admirable skill in government and Law-making, that after-nations might have a good example to follow. It is *St. Austin's* judgment, ⁱ That the *Roman* Empire had that glorious increase, not onely to be a fit guerdon to the vertues of such as bore rule there, but also that the Citizens of heaven in their pilgrimages upon earth, might seriously and attentively fix their eyes

ⁱ *Lib. 3. De civitat. Dei. cap. 6.*

eyes upon those examples. And before him *Tully*, as *Lud. Vives* hath cited him, being to draw a Model of a Commonwealth, and Laws to govern it withall, sets before his eyes no other pattern but that of the *Romans*, to which in his judgment all people should in prudence shape and conform themselves.

^{*} *Lib. de caus. corrupt. art.*

And that our Saviour Christ himself (God almighty from all eternity so disposing it) should be born under the government of the *Roman* Empire, and submit to it too; may it not more than probably be inferred, that it was God's secret intent and purpose, if not to bring all Christians under subjection to those very Laws under which their head was born and lived; yet at least by that signal act of his to recommend that policy and government to their imitation, which might be a means to propagate the Gospel of Christ, and to send it forth to the whole world, which that Empire seemed wholly to command? *St. Austin*¹ makes the Universal rule of the *Romans* a special design of God for the good of mankind. *Per populum Romanum placuit Deo terrarum orbem debellare, ut in unam societatem reipublicæ legumq; perductum longè latèq; pacaret*; It was therefore, saith he, God's pleasure that the *Romans* should conquer and command the whole earth, that being brought under one communion of government

¹ *Lib. 18. de civit. Dei ca. 22.*

vernment and form of Laws, it might the better enjoy peace both far and wide.

Videtur Dominus Monarchiam Romanorum conservasse & propagasse, ut simul propagaretur honesta eorum Politia, & reprimeretur incondita barbaries aliarum gentium, says Baldwine;^m

^m In his Prolegom.

Therefore was the Roman Empire by God's permission so far extended, that their good government might spread the more, and the conversation of barbarous and wild Nations be made civil.

And indeed the continuance of it in such diversity of governments, as Kings, Consuls, Tribunes, Dictatours, Emperours, cannot but shew a Divine power, and a most prudent managery of affairs there in all vicissitudes: For otherwise so many changes might in all likelihood have bred confusion, and so consequently suppressed their rising to so great an Empire; which as the last, so it may be truly stiled the greatest that yet the world ever knew or heard of.

ⁿ *Romani trium pulcherri-
marum virtu-
tum, iustitie
inquam, for-
titudinis, ac
prudentie lau-
dibus, impe-
ratorii que ar-
tibus cumula-
ti, populos om-
nes in sui ad-
miracionem
converterant.*
Bodin. de rep.
lib. 5. cap. 6.

Thus therefore the Roman Empire having climb'd up to such an height of Sovereignty, as to be a spectacle and an astonishment to all other Nations; ⁿ and their government being generally proposed and look'd upon as a pattern, and by some judgments designed as an example by God himself for other States to follow and be directed by: What does it witness less, than that the Laws of such a Nation and government must needs be singular and incomparable? CHAP.

C H A P. II.

The fundamentals of the Roman Civil Law were fetch'd from other States, which did then excell others most in Policy and Government.

THE first grounds and foundations of the *Civil Law* were not of the *Romans* own composing, but were fetch'd from other Nations, and those the best governed that were in being : for when they had cast off Kingly government, and put themselves into the form of a Commonwealth, they would no longer endure the Laws that their Kings had made, partly because they would not suffer any memory of their power to remain, and partly because the setting up of a new government would require necessarily the making also of new Laws, which might correspond therewith. Therefore since a present supply of Laws was necessary (arbitrary rule being intolerable) and that to frame a body of Laws themselves in a short time, was impossible, and not by a new-born State to be effected; they appointed three eminent men to go to *Athens*, and other Græcian Cities which had

had been famous for rule and administration of justice above others, to fetch from thence the choicest Laws they could find.

At the return of those three men, the Consuls that had bore the sway were deposed, and both their Authority and Ensigns given unto ten men newly elected for the government of the State, and were thence called *Decemviri*, whose office it was to select the best of these Laws, and by them precisely to rule and doe justice to all the people. The Laws that they chose and best approved of were written at first in ten Tables of Brass, to which two Tables more being added afterwards, they were all set up together in the open Market-place to be seen and read by the people, which ever after were distinguished by the name of *Leges 12 Tabularum*, The Laws of the 12 Tables.

° *Lib. I. De Orat.*

To the direction of these Laws the Roman people were subject, and conformed themselves for a long time, and they were the onely Law they had: Of the which Tully ° gives this high testimony, that this one book of these Laws, both for usefulness and wisdom, did transcend all the books that all the Philosophers of the world had written.

And although their engravement in brass could not preserve them from the injury of time, nor rescue them from that universal change that altered all things in
the

the *Roman* Empire; whereby it came to pass, that some relicks onely of them are now extant, to the lamentation of all the learned: Yet the Historians without any disagreeing tell us, that the rise and beginning of all the *Civil Law* that we have in the books of *Justinian*, came from those Laws; Thus *Livie*, *Tacitus*, *Sigonius* and *Rostinus*. And no less is delivered by *Pomponius* himself in his large Narrative of the beginning and progress of the *Civil Law*; ^P and as much by *Justinian* himself ^q.

And hence it is that every where throughout the body of the *Civil Law* frequent and common mention is made of the Laws of the 12 Tables, and several of them entirely recited; and some of them confirmed and enlarged; others quite taken away; some of them diminished onely, as to some circumstances; others interpreted, as being very obscure and doubtfull; some declared in what cases they shall be of force, and in what not; and others stretch'd to other cases not provided for in express words, but in presumption thereby intended, because so much alike to them that were expressed.

It was a Law of the 12 Tables, *Ut si quis hostem concitasset, civemve hosti tradidisset, capite pœnas lueret*^r; that is, if any shall stir up an enemy, or betray to the enemy any subject, he shall be punished with death. The same Law is cited in

^P L. 2. Dig.
De orig. jur.
^q Parag. 10.
Inst. de ju.
nat. gent. &
civ.

^r Part. 2.
ca. 8.

l. 3. Dig. Ad l. Jul. Majest. where and in other Laws of that Title it is declared, it shall be high treason for any man to contrive any mischief against the State, either in raising tumults or levying war against the supreme power of it, or even against the enemies of it without commission; or in holding correspondence with the enemy, or sending any manner of aid unto them, or in helping to bring them into the Territories of the Commonwealth, or to betray the army or any part thereof, or any place of strength into the enemies hand, or indeed to surrender it cowardly without fighting when it may be kept, or to plot how publick hostages may escape, or for a General to leave the army without leave obtained, or not to give up his charge to him that by publick appointment is to succeed him, after the State has once discharged him: The punishment whereof is not onely capital, but the memory and name of the offender is to be remembred no more, his goods are confiscated, and not to go to his own children.

l. 5. Co. ad l. Jul. Majest. parag. 1.

Again, by the Law of the 12 Tables it was provided, first, that the custody of such as were mad, and the managing of their estate should be in the hands of the next heir male: Also if any one come to be a prodigal or spend-thrift, the Magistrate first examining the matter, should forbid

forbid him the ordering of his own estate, and the administration thereof should be in the next heir male ^c. The last of which Laws may be found single in l. 1. *Dig. De curator. furios.* and both of them joyned together *Inst. De curator. parag. 3.* Where the care of the Law in providing governours for those that are not able to help themselves, nor follow their affairs, is extended to Idiots, to persons that are deaf and dumb, and to such as labour under such an incurable disease as is never like to leave them, and renders them unfit to attend their business, as well as to mad men and prodigals; declaring him to be a prodigal, *Qui neq; tempus neq; finem expendarum habet, sed bona sua dilacerando & dissipando profundit*, who wastes without regard either of time or measure; a mad man, *qui rabie quadam animi agitur*, who is in a violent fury; an idiot, *qui sine tumultu ac clamoribus desipit*, who is void of understanding, but never rages. And farther, the Law proceedeth in avoiding and disannulling all contracts, negotiations and dealings, which such persons shall have made for themselves, after Guardians are once assigned them; yet with this difference, that a Prodigal, or such as have common reason, though otherwise very impotent and needing a curatour, may contract to advantage themselves, though not to their loss and hindrance: But such

^u L. 6. Dig. De
verb. oblig. l. 5.
Dig. de reg.
jur.

as want capacity and understanding, can
doe no good for themselves ^u.

And although the Law of the 12 Ta-
bles seems to bestow upon the Guardian
of such disabled persons absolute power
over their estates, yet the *Civil Law* will
have that understood to reach no farther
than to the husbanding of their estates
for their use and benefit; for it will not
permit them to sell, aliene, or mortgage
any thing that does belong unto them,
except that upon examination of the Ma-
gistrate it be found advantageable and fit
to be done, and that the Magistrate does
expresly make his decree to that purpose.
Insomuch that if money be taken up by
the Guardian for the need and to the use
of any such person, and his land mort-
gaged for payment of it, yet if it be not
done by the licence of the Magistrate,
the serving of that impotent mans neces-
sity how extreme soever, will not make
that mortgage the more forcible; such
care has the Law to preserve the patri-
mony of such from being pass'd away.
Yet since the money lent was so well em-
ployed, the Law that suffers no man to
be enriched with anothers detriment, gives
the lender a personal action whereby to
recover what he lent ^x.

^x L. 2. Co. de
curat. furios.

Lastly, does the *Civil Law* afford more
plentifull provision on any subject than that
of last Wills and Testaments? Yet the first
rise

rise and foundation of all that is written therein, came first from that Law of the 12 Tables; *Uti quisque rei sue legasset, ita jus esto*, y that is, As a man shall order by his Will in any thing that is his own, so let it be. The very words of which Law are repeated, *Inst. De leg. Falcid. in princ.* and *l. 120. Dig. De verb. significat.* But the questions falling under this head, do not onely take up whole titles in the Law, and those very large ones too, but also many of them lye disperfed up and down in all places and parts of the Law. y Part. 3. cō. 11.

So that generally it may be observed, what Laws soever are written almost on any subject, are but as so many explanations or enlargements, made by the old primitive Lawyers, such as *Gaius, Scævola, Papinian, Ulpian, Paulus, Affrican*, and the rest of those Worthies, and are as it were their Comments on the Law of Nature and of Nations, and upon this Law of the 12 Tables; at first a foreign Law, but brought into the *Roman Commonwealth* by a common consent of all the people, from such Nations as for rule and government might justly be an example to all their neighbours.

In like manner the Sea Laws that were admitted into the *Roman State*, and incorporated amongst their Laws, were fetch'd from another people, namely the people of *Rhodes*, Islanders in the Car-

pathian Sea, bordering upon *Caria* in *Asia*, who in respect of the mighty course of Sea-faring-men thither, and their continual trade and potency by Sea, grew so expert in the regulation of all matters and differences thereto appertaining, and their determinations therein were esteemed so just and equitable, that their Laws in such affairs have been held oracles ever since. And therefore *Antoninus* the Emperour to a complaint that was made unto him by *Eudemon*, whose goods had been seized by some publick officers upon a shipwreck, gave him this answer, *Ego quidem Mundi Dominus, Lex autem Maris. Lege id Rhodia, quæ de rebus nauticis præscripta est, judicetur, quatenus ei nulla nostrarum legum adversatur*; ² That is, I am the Lord of the world, but the Law is the Empress of the Sea. Let the Rhodian Law which has the regulating of Sea matters decide it, so that none of our own Laws be opposite thereunto.

¹ L. 9. Dig.
De lege. Rhod.

And generally it was their custome and usage, that whensoever they conquered any Nation, they did not onely give them Laws, as conquerours use to doe to those whom they subdue, but I may say, they received Laws from them too: For what Laws, practices, or ways of government they found there or any where else where they came, that were laudable and usefull in their State, they carried them home,

home, and there put them in practice; observing them rather with humility, than rejecting them with disdain. *Majoribus nostris*, saith *Salust*, as *Baldwine* quotes him in his *Prolegomena*, speaking of the Romans, *superbia non obstabat, quo minus aliena instituta, si modo proba erant, imitarentur. Imitari quàm invidere bonis malebant, & quod utiq; apud socios vel hostes idoneum videbatur, cum summo studio domi exequiebantur*; Our Ancestours were not so high minded, as not to imitate such rules and customs of other Nations as they found to be good, chusing rather to tread in the steps of vertuous and well disposed people than to envy them. Therefore what either allies or enemies afforded that was usefull and fitting, they greedily embraced and practised it in their own State.

And if *Salust* may be thought partial, because a *Roman* writer, let *Polybius* speak, that was a *Græcian*: They were always so wise, saith he, as, *Καὶ μεταλαβεῖν ἔθνη, καὶ ζηλωταὶ τὸ βέλπον*, to take and apply the best customs of other Nations to their own use. *Athenaus* saith the same, and declares it at large, how from the beginning and first founding of the Commonwealth, they took from others the best points of policy and government.

And so in these Laws of ours we have what all the wisest and noblest men in that Commonwealth (which was the

most flourishing and potent that ever was in the world) could of themselves by their wisdom and reason devise, or could learn from other States in about a thousand years; for about so many years it was from the time of the Decemvirate unto *Justinian's* death. *Tanta molis erat Romanas condere leges.*

From this example of the *Romans*, who admitted so freely other Laws besides their own, and would rather send about to borrow Laws from others, than want such as were necessary and convenient for themselves, we may learn to esteem it neither shamefull nor inconvenient for the people of this Nation, to give such an admittance to the *Roman Civil Law* here, as the *Romans* did in their State to the Laws of other Nations: For it must needs draw after it much benefit, and no prejudice, if it be done with these cautions.

First, that it be a free and a voluntary act of our own, and not imposed upon us by a foreign power.

Secondly, that it be admitted merely to supply the defects of our own Laws, and to have a resolving power in such cases onely, where our own Laws have made no determination at all.

Thirdly, so little to be made use of in opposition to our own municipal Law, as not so much as to be compared with it.

Fourthly, that it be of greatest force
in

in all cases where there is greatest need of equity and a good conscience, whereof there is more to be found in that Law than in any other Law of Man.

Fifthly, that it may order and determine all matters transacted and arising upon the Sea, or contracted and done in foreign parts, to which the Laws of the Land are most incongruous, and less satisfactory to those whom they concern, being chiefly strangers and of another Nation.

Lastly, that if at any time the use and exercise thereof should be stretch'd beyond the bounds that are allowed it, it should be penal; but be check'd by such equal and indifferent Umpires, as are parties in neither of both professions: For where an incroachment is pretended to be made by either Law upon the other, neither seems to be competent enough to judge the difference, or to condemn the other.

Under these cautions, to admit the use of the *Civil Law* into this Nation, that in the doing of justice, where our own Laws fail, we may be sure to be supplied by another, is no more than what the *Romans* themselves, a renowned and wise people, did by the Laws of other Nations, and what other Nations do at this day by the *Civil Law* it self, which they do practise and use as frequently as they do their own.

CHAP. III.

That time and intervenience of fatal Accidents, that has swept away so many States together with all their Laws, and has quite abolished the Roman State it self, has not yet been of force to abolish the Roman Civil Law, but that it is extant still.

BESIDES that this Law was at first derived from such Nations as in their time were renowned for Policy and Wisdom, and was a chief means to convey the *Romans* to their greatness; this also may be said thereof that can be said of no other humane Law besides, That though it has been never seen that any Law has lasted longer than the State it self for which it was first ordained, but both have been buried in the same sepulchre together; yet this Law is in being to this very day, after the *Roman State* it self has so long lain intombed in its own ashes. *Jus Justiniani præscriptum libris, non Civitatis tantum est, sed & Gentium & nature; & aptatum sic est ad naturam universam, ut imperio extincto, ipsum jus diu sepultum surrexerit tamen, & in omnes se effuderit*

rit gentes humanas. Ergo & Principibus
 fiat, etsi est privatis conditum à Justiniano,
 says Albericus Gentilis; ^a The Law that ^{• Lib. 1. De}
 is set down in the books of Justinian, is ^{ju. Bell. ca. 3.}
 not the Law of one City onely, but is
 the Law of Nature and Nations; and is
 so throughout fitted to very Nature it
 self, that when the Roman Empire was
 quite extinct, yet the Law of the Em-
 pire, after it had lain long as it were bu-
 ried, sprung up again, and spread it self
 into all Nations. Therefore now it is
 become a standing Law to Princes, al-
 though made at first by Justinian for the
 use of private men.

We know for certain, that at the first
 erecting of Common-weals, when some
 certain kind of regiment was once ap-
 proved, nothing was then farther thought
 upon for the manner of governing, but
 all permitted unto their Wisedom and
 discretion, which were to rule; the Prin-
 ces word, beck, and rule, serving in-
 stead of all Laws; who both in time of
 peace and war, sent out their edicts from
 time to time, as the present occasion re-
 quired, all depending upon their full and
 absolute power, being themselves not
 bound to any Laws or Customs at all.
 And that is it, for which Pomponius ^b writ- ^{• L. 2. Dig.}
 teth, the Roman Common-weal to have ^{De Orig. jur.}
 been at the first governed by Regal power, ^{in princ.}
 without use of any Law.

Justin

• Lib. 2.

Justin ^c saith of *Athens*, that there was a time, when *Nulla civitati leges erant, quia libido Regum pro legibus habebatur*, that the City was without Law, because the wills of Kings were Laws. And *Josephus* the Historiographer in his second Book against *Appian*, desirous to shew the most honourable Antiquity of the Hebrews, and of their Laws, saith, that *Moses* of all others was the first that ever writ Laws; and that in five hundred years after, the word *Law* was never heard of; alledging in proof thereof, that *Homer* in so many books as were by him written, never useth this word, *νόμος*, *Law*. ^d It may therefore well be told us, that we have no cause to marvel, if we have no Laws at all transmitted unto us from those first times, there being then no certain standing Law any where.

• *Ut honestorum ac turpium lex eterna in mentibus uniuscujusque nostrum ab immortali Deo sit inscripta, poena tamen quibus improbi ab injuriosa facinorosaque vita avocentur, in animis inscripta à Deo nulle fuerunt.* Bodin. de rep. lib. 6. ca. 6.

Yet I am sure, afterwards, when all people saw that to live by one man's will became the cause of all mens misery; this did necessitate succeeding ages to come unto Laws established, wherein all men might see their duties before-hand, and know the penalties of transgressing them, ^e and be more secure against the irregular passions of their Rulers, whom they found by wofull experience to be too apt to degenerate into Tyranny: And yet they have not rested here neither, but have committed the same to writing

writing, that their subjects might have them continually before their eyes; and to transmit them to posterity also, lest they that should come after, should vary from those foundations on which the State was first laid, and so hasten the downfall of the whole society.

Hence it has come to pass, that the Laws of some certain people have been more famous than the Laws of others, and the Authours mentioned with high praise and commendation. *Solon*, who made Laws for the *Athenians*, and was accounted one of the seven Sages in *Greece*, is highly commended for his great wisdom in making Laws both by *Aristotle* and *Plato*, who proposeth him and *Lycurgus* the *Lacedemonian* Law-giver, as patterns for all such as shall institute Common-wealths, and devise Laws for them. *Plato* also praiseth the *Cretensian* Laws, and *Isocrates* the Laws of *Lacedamon*. *Zaleucus* is upon record too for being a great Law-giver amongst the *Locrians*: and *Charondas* has got himself a name for the Laws the *Thurians* had from him; And so has *Zamolxis*, *Pythagoras* his scholar, for the Laws he gave the *Getae*.

And yet of all these Laws so much extolled and spoken of amongst the Learned, there is not one extant to this day in any entire body; I say, in an entire body, because of the *Attick* Law
some

some fragments may be found, which the industry of *Petitus* has collected out of several Greek Authours, as *Athenaus*, *Plato*, *Plutarch*, *Demosthenes*, and others, where they lay dispersed; which though they may busie Criticks and those that contemplate upon Antiquity, yet are of no use to govern a State by, nor to decide differences that arise in common intercourse. As it is no small wonder then, so does it add much to the Honour of the *Roman Civil Law*, that it has not been swept away by that common fate under which these and all other ancient Laws have perished, but is the sole surviving Law at this time. The preservation whereof is the more to be admired, if it be considered, how by the storms and persecutions of several ages, near it has been to be annihilated and quite suppress, as all other Laws besides it have been. For as the affairs of State have succeeded, and as the Emperours themselves have been vertuously or vitiously inclined, so has it fared with this study and the professors of it, and indeed after the same manner with all other kind of learning.

Julius Caesar, *Augustus*, *Tiberius*, *Claudius*, *Vespasian*, *Trajan*, *Adrian*, *Antoninus Pius*, and *Marcus Antoninus* the Philosopher, *Alexander Severus*, *Constantine*, *Theodosius*, and *Justinian*, that were Emperours vigilant and industrious for the prosperity

perity and weal of the Empire, and designed nothing within themselves but actions of vertue and honour; and well knowing that their true interest lay in the maintaining of the Laws and government, without which all things must needs run hastily into disorder and confusion; they had the Lawyers of their times in highest esteem, preferring them to the public offices of State, both of honour and justice; and admitting them into their secretest and most important counsels; and seldom was any Law made, to which they were not call'd to give their counsel and advice: Infomuch as it is written of *Alexander Severus*, one of the before-named Emperours, that he never established any Law without the presence and assistance of twenty of the most renowned Lawyers, and fifty other most judicious and acute men. ^f

^f *Baldwin*
Prolegom. ju.
Civil. Forster
hist. ju. civ.
lib. 2. ca. 77.

But there were others that sate in the Empire of a far different nature and disposition, who disdaining that their will, how vicious and lewd soever, should be circumscribed within the bounds of any Law; and esteeming it a dishonour, that Lawyers, who were but private men, should undertake to advise Princes; or that any thing should be done in State but what themselves absolutely commanded; some of them despised the whole Law, and slighted those that taught it; others

others proceeded so far in cruelty, as to banish some, and to put other Lawyers to death; for so did Nero, Commodus, Caracalla, Heliogabalus, Septimius Severus.

§ Anna. Robert. rer. judic. lib. 2. ca. 1.

But to persecute and take away their persons did not satisfy the fury of some implacable Emperours, since others did succeed still in their room. Therefore it was thought necessary by some, that the Law it self should be so dispatch'd, as it might be sure it should never renew or rise again. § Caligula therefore put on a more hardy but a most barbarous resolution, to burn all the books of the Law that were then extant; pretending that equity would run clearer; and justice be quicker, where the niceties and perplexities of the Law were gone. *Sed non fuit tam diuturnum ejus imperium, ut efficere potuerit quae meditabatur; nec passus est Deus rata esse hujus tyranni impia & reipublica perniciofa consilia;* But his reign did not endure so long as to execute what he did intend; neither would God suffer the design of this tyrant, that was so detestable in it self, and so destructive to the Common-wealth, to be brought to pass; says Baldwin in his *Prolegomena*. Notwithstanding how odious soever this intendment was, and though it proved ineffectual in Caligula, yet did Licinius the Emperour attempt to doe the very same thing; but God would not suffer such a barbarous

barbarous act to be done by him neither, says the same *Baldwine*.

So that as often as it is call'd to mind, what extremities fell upon the Lawyers in the sufferances of their persons, and how near the whole body of the Law it self was to be swallowed up and at once devoured, and that from no foreign enemy, but from the *Roman* Emperours themselves, who should have protected both; it must also be remembred, that those Emperours were such, whose actions are hated and abhorred by all that reade them, and themselves stigmatized for cruel and unnatural tyrants, and esteemed rather Monsters than Men. Let it be considered also, that they did it to make way for their unbridled and tyrannical wills, which they thought might be more licentious, when there was neither person nor Law left to awe them. And let it withall be spoken to the eternal honour of that Law, that it stood flourishing notwithstanding, after so many Emperours had vainly attempted to throw it down.

But never was it so near to utter extirpation, as when a combined strength of barbarous people over-ran the Western part of the Empire: For we reade, that in less time than the compass of eighty years, *Italy* (though anciently the strength and seat of that Empire) was seven times brought almost unto desolation by

by fire and sword of the Barbarians, viz. First, by *Alarick* King of the *Goths*, who sack'd *Rome*, *Naples*, and other places. Secondly, By *Attila* King of the *Huns*, who razed *Florence*, wasted *Lombardy*, and not without much difficulty was diverted from the spoil of *Rome*, by the intercession of Pope *Leo*. Thirdly, by *Genfericus* King of the *Vandals*, who also had the sackage of *Rome* it self. Fourthly, by *Biorgus* King of the *Alani*, in the time of the Emperour *Majoranus*. Fifthly, by *Odoacer* King of the *Heruli*, who drove *Augustulus* the last Western Emperour out of his estate, and twice in thirteen years laid the Countrey desolate. Sixthly, by *Theodorick* King of the *Goths*, called in by *Zeno* Emperour of *Constantinople*, to expell *Odoacer* and the *Heruli*. And seventhly, by *Gundebald* King of the *Burgundians*, who having ran sack'd all *Lombardy*, returned home again, leaving possession to the *Goths*.

And when the *Goths* had reigned in *Italy* under eight of their Kings for the space of seventy two years, they were at last subdued by *Belisarius* and *Narses*, and *Italy* united once more to the Empire in the time of *Justinian*. But *Narses* having governed *Italy* about seventeen years, and being after such good service most despitefully used by *Sophia* the wife of the Emperour *Justinus*, in revenge opened the passages of the Countrey to *Alboinus* King of

of the *Lombards*, then possessed of *Pannonia*, who coming into *Italy* with their Wives and Children, possessed themselves of all that Countrey which anciently was inhabited by the *Cisalpine Galls*, calling it by their own names *Longobardia*, now corruptly *Lombardy*. And afterwards in process of time they grew so mighty and spreading there, that there are reckoned no less than twenty three Kings of that line succeeding one another in *Italy*, and their Kingdom endured no less than 206 years.

Italy therefore being thus rent from the *Roman Empire*, and the Imperial seat being quite carried out of the West, and fixed in the East at *Constantinople*, the power thereof came to be less feared, and other of the *Roman* provinces were likewise assaulted: For *France*, after it had been long harassed by the incursions, first of the *Burgundians*; and then of the *Goths*, was afterwards invaded and quite possessed by the *Franks*; who having long hovered on the banks of the *Rhene*, at last took advantage of the distractions of the Empire, and ventured over the River under the conduct of their first King *Pharamond*, and quite expelled the *Romans*, and laid such a strong foundation of government there; that they have in a constant and un-interrupted succession continued there ever since.

Spain did not long remain in subjection to the *Romans* neither, out of which they
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were driven by the *Goths* also, who kept the quiet possession thereof very near three hundred years, till the *Moors* and *Sardians* dispossessed them; who there reigned full seven hundred years.

As for *Germany*, it was never wholly subdued by the *Romans*, but what they had gained thereof, the French, *Burgundians*, *Almans*, and other Dutch Nations took from them: till in the end the French prevailing over the rest, extended their Empire over all the modern *Germany*; chiefly performed by the valour of *Charles* the Great, King of *France*, created Emperour of the West by the people of *Rome*, and Crowned with the Imperial Crown by Pope *Leo* the fourth, with whom and his successours it remained above an hundred years, till at last by alienating whole countries from it (some titularly acknowledgment onely excepted) and by dismembring it into many Principalities and inferiour States, and those made absolute and independent, that great Empire came to be nothing in effect, but *magni nominis umbra*, the shadow of a mighty body, a mere empty Title; having no resemblance of the *Roman* Empire, from the which in the person of *Charles* the Great it was quite divided.

England also, that was made a perfect member of the *Roman* Empire, being invaded by the *Scots* and *Picts*, and the Ro-

mans

mans being enforced to recall their Legions they had here, for the defence of *Italy* it self, then wasted and destroyed by the barbarous Nations, was relinquished and given up, as a province that was to be held by the *Romans* no longer; *Honorius* being at that time the *Roman* Emperour, and *Victorinus* the last Governour for the Empire in the Isle of *Britain*; the *Romans* having been in it full five hundred years; and their Laws also.

Thus the *Roman* Empire being rent in sunder, it is easie to imagine, that the *Roman* Laws which constantly attended the *Romans* wherever they went, were also dissipated in the same tempest; Laws and Government being like *Hippocrates* twins, they laugh and cry, live and die together: For Conquerours never think their Conquests perfect, till they have overthrown the ancient Government, Laws and Customs, and have put all into a new mould after their own way. Neither is a People thoroughly brought under subjection to their new masters, till they have utterly renounced all that was prescribed them by their former Rulers: Nor is the danger of their revolting quite over; till they have quite forgotten their first condition, and till a total change is made of Laws, Customs, Habit and Language. And who knows not, that it is in the power of the Sword; being well fortified, to impose
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what Laws and Rules it self will upon a people, who after a tedious and a destructive war will rather embrace an ill conditioned peace, than run the hazard of a new war, where they are sure to be swallowed up in spoil and rapine?

In this declining therefore of the *Roman* Empire, many Provinces thereof being possessed by several invaders, it is certain that the conquering people gave their own Laws to the conquered, but ruled most ^a by power and arbitrary will. *In iis seculis*, says *Dr. Duck*, ^b speaking of the declension of the *Roman* greatness, *non erat aliud parendi dominandæque jus quàm armorum potentia, crassa literarum omnium ignorantia, leges omnes barbaricæ, Gothicæ, Francicæ, Lombardicæ, sepulsis jam legibus Romanis, rerum omnium morumque confusio*: In those times there was no other rule, but what the sword did give, a gross ignorance of all literature, the Laws all barbarous, had from the *Goths*, *Franks*, *Lombards*, the *Roman* Laws lying now in the grave, and indeed a plain confusion of civility, and all things whatsoever. *Ludovicus Vives* ^c mentioning the utter downfall that was of all learning at that time, tells us also the politick reason that animated that savage people to deal so tragically with it: *Irrisa sunt ab eis lingua ac studia omnia*, saith he; *Nec solum eis detractum est pretium, sed contumelia addita; seu quòd nollent quenque in victis plus sapere*

^a *Juxta illud Silli; Vis colitur, jurisque locum sibi vindicat ei-fis.*

^b *Lib. I. de Auth. ju. civ. ca. 7.*

^c *Lib. I. de caus. corrupt. Art.*

sapere quàm victorem, & ut quisque esset doctissimus, ita crassis illis hominibus inprimis erat suspectus, tanquam vaser & ad fraudes ac dolos maximè appositus; seu quòd emollire per hac veram virtutem opinarentur, ac minus bello idoneos reddi, cui omnia illi tum tribuebant, laudem, gloriam, decus; ex bello uno verum germanumque, etiam sempiternum oriri rati: They laugh'd at the variety of tongues, and at all literature; Neither did they onely disesteem them, but they cast reproaches upon them also; either because they were not willing, that any that they had now brought under subjection should be wiser than themselves, who being blockish, did cast a jealous eye upon those that were most knowing men as they that were subtile, and fitted for all politick and wily practices: or because they had a conceit, that learning did too much soften and enervate valour, and render men unfit for war, in the which they thought all praise, glory and renown did lye; and that nowhere true and immortal honour was to be won, but in war onely.

Which torrent of ruine then happening, was the more unfortunate and fatal, in regard through *Italy* and the *European Nations* being thus infested, that which is the *Roman Civil Law* now, and was collected and put together by *Iustinian* himself, and doth bear his name (though selected out of a great confused mass, consisting

sisting of near two thousand Volumes, that had been fourteen hundred years a laying together by several Lawyers) could not have any place then in *Italy*, nor could ever get entrance into those parts for five hundred years together after the death of *Justinian*: Because this body of the Law that is now extant, was compiled and put together at *Constantinople*, after the *Roman* Emperours had removed themselves thither, and kept out of *Italy* and the Western part of the Empire for all that time that those Barbarians were possessed of the same.

Howbeit it is no less certain, that the ancient *Civil Law* that was in being long before *Justinian's* time, and that very frame and model thereof which was drawn together and raised out of those ancient foundations by *Justinian* himself, was the sovereign and ruling Law at *Constantinople* and all over the East, where the *Roman* Empire then was, and was translated into the Greek tongue for the use of the people, and there continued flourishing at that time when the West would not admit it. So that it is to be noted, that when it was driven or kept out, it was by a barbarous people that followed all with fire and sword; and that it did not suffer alone, but all civility and learning was banished with it too: and that it was never so extirpated from off the earth, but it had a being and continuance somewhere. And

And yet there was a part of *Italy* also, namely the Exarchate of *Ravenna*, consisting of ten Cities with the territories belonging to them, which the barbarous people could not subdue, nor make them change their Governours, Government, or Laws; who being still ruled by the Viceroy and Lieutenants of the *Constantinopolitan* Emperours, were totally governed by the *Roman* Laws as they were before. And after the collection of Laws made by *Justinian* was perfected and published, and was now to be the onely Law for the whole Empire, it was sent to and embraced by the Exarchate of *Ravenna*, and there practised, though no where else throughout *Italy* for five hundred years together.

Notwithstanding, it cannot be truly affirmed neither, that even those parts of *Italy* which the *Romans* had quite lost, and were made subject to this barbarous people, were totally guided by another Law, and had none of the *Roman* Law to guide them.

For, although the *Goths* ruled much by Laws of their own prescribing, yet *Cassiodore* writes, that in the time of *Theodorick*, and some of his successours, the *Roman* Law that had been in use there before, was also used still, though but in a way of subserviency to their own.

Lib. 7. ca.
43.

And *Ataulphus* fully purposing *Romana omnia adeo in Gothicum nomen morésque mutare, ut Romanum planè obliteraretur*, so to change all that was *Roman* into the way and fashion of the *Gothick* Nation, that nothing that was *Roman* should remain any longer, Mr. *Selden* out of *Orosius* ^d says, upon better consideration had, he changed his resolution quite, and did by all means strive, *ut Romana restitutionis auctor haberetur, postquam esse non poterat imitator*, to be the chief setter up of the *Roman* policy, which he saw he should not be able to throw down.

For the time therefore that the *Goths* and *Lombards* were possessed of *Italy*, the Codes of *Theodosius*, and some things taken out of the *Gregorian* and *Hermogenian* Codes, and *Gaius* his Institutions, *Ulpian's* fragments, and the Notes and sentences of *Paulus*, all parts of the *Civil Law*, and ancienter than that body of Laws whereof *Justinian* was the compiler, were taken in and admitted into use together with their own Laws. Those Provinces of *France* that are nearest unto *Italy*, when the *Goths* came to invade them, were also permitted to enjoy the *Roman* Laws upon the same terms; and especially when *Honorius* and *Arcadius* surrendered *Acquitain*, one of the conditions was, *ut lex testamentorum iis salva esset*, that their Laws for ordaining or expounding their last Wills should not be infringed. And

And *Alarick* the second, one of the *Gothish* Kings, was so affected towards the *Roman* Laws, that in the year 506, he employed his own Chancellour *Anianus* to make a Collection out of the several parts of the *Roman* Laws, whereof the *Theodosian* Code was the chief, and to write Notes and Expositions upon it; which after he had done, it was published and set forth to be observed as Law in *France*.

And Mr. *Selden* writeth, ^c that the same King did the like in *Spain* too as well as in *France*.

^c *Dissert. ad
Flet. ca. 5.
parag. 4.*

So that albeit ruine, devastation, and violence had buried all that was *Roman* besides; and for the better and more sure keeping of what was gotten, clean another Government and another Law was also settled; yet the *Roman* Law, either out of necessity, because they saw the hearts of that people so set upon that Law, that they would never have remained quiet or peaceable without it, or out of some good esteem that such a wild and barbarous people bore to it themselves, finding it to be so wise, solid and rational, was still retained in some use in *Italy*, *France*, *Spain*, and in *Germany* too, as the same Mr. *Selden* affirmeth, amidst its very enemies, though much diminished, corrected, and controlled by their own supereminent and over-ruling Law. So good a piece of policy, and such a special

cial mark of wisdom was it then accounted, to have two Laws in the same Territory ; the one of the *Romans* for private matters between man and man, for which it was so sufficient, full and equal ; the other of their own, to direct and steer the publick upon all accidents, which they meant should super-intend and reign in chief over and above the other.

But farther, not onely the use, practice, and observation of the *Roman* Law has been in danger to be quite lost and wholly set aside, but the very books and writings of the Law have run very hard fates also ; *ut mirum sit vel has qualescunque juris Romani reliquias superesse*, says *Baldwine* in his *Prolegomea* ; that it may be admired we have such parcels thereof extant at this day. It was a most unhappy fate, and very worthily lamented by all learned men, that after *Justinian's* composition of the Law was perfected and set forth, with a command, that that onely should be the Law of the Empire, *omnibusque antiquioribus quiescentibus, nemoque audeat vel comparare eas prioribus*, as *Justinian's* own words are ; ^f all the old Laws being quite put to silence, nor that any should dare to make comparisons between them ; the very Law-books themselves being two thousand Volumes, as we said before (whereof *Justinian's* new work was but a choice Collection, raised out of a confused and an

^f L. 2. Cod.
De Veter. jur.
enucleand.

an indigested heap, and thence put into order) did thereby lye neglected so long, that in process of time, they perished quite, and were never seen more.

Questionless had they been preserved, and transmitted unto posterity entire, they would have acquainted us with much more of the *Roman* Antiquities than we now know; the *Civil Law* that we have would have been much better understood, when we might have gone to the Original from whence it came; and the contradictions now contended about so much, would have been easily reconciled.

The sense of this loss did cast *Sabinus Floridus*, who charges it upon *Justinian*, into such an ecstasie of indignation, that he says, *Justinian* died mad with the consciousness and horroure of suppressing these books, and judges him not worthy ever to have been born. But *Franciscus Philelphus* goes a strain higher, plainly imprecating in this manner:

*O utinam Superi, si quid mortalibus usquam
Iustitia reliquum, te, Justiniane, sub imis
Manibus ardenti plectant Phlegetonte jacentem;
Postquam tanta Italæ millena volumina
legum
Principe te clades, te principe pestis ademit.*

Now though I see not any ground to justify so much bitterness, nor indeed deservedly

fervedly to make that renowned Emperour Authour of such a crime, being especially thought by the most not guilty; yet since those books of Law that are left us, which are but an extract from the other, are of such high price and value, surely, when the other perished, there was lost a very great treasure.

Again, as there were three Cities famous above all others, for the nourishing and maintaining of the study and learning of the *Civil Law*, to wit, *Rome*, *Berytus* and *Constantinople*; In which three Cities onely by an expresse constitution of *Justinian*, & it was to be read and taught to others, and no where else throughout the *Roman Empire*; so it was not possible but the books and writings thereof must be lost and destroyed, as indeed they were, in the direfull events of those Cities: For *Rome* was often spoiled, sack'd, and laid waste, by rude and savage people, who would not spare books or learning, that they knew would detest, condemn and censure them, and their barbarous actions. *Berytus* was so utterly swallowed up in an Earthquake, that nothing of the whole City was left above ground. *Constantinople* in *Zeno* the Emperour's time, in the year 478 was almost wholly destroyed by fire; in which perished, amongst other things, an hundred and twenty thousand books; and is since fallen into the power

& Digest. Pro-
em. parag. 7.

power and hands of the *Turks*, professed enemies to civility and learning, the same being taken by *Mahomet* the Great, in the time of *Constantine Palaeologus* the last of the *Græcian* Emperours, in the year 1452.

Thus has it fared with the very books and writings of the *Civil Law*; but such has been the providence of the Almighty in preserving this necessary piece of learning, that neither any nor all of these disasters have been powerfull enough to extinguish it. For although it seemed sometimes to be buried, and no where visible, yet at last by one means or other it was restored and brought to light.

But to none more is the honour of this restitution given, than to the Empe-
rour *Lotharius* the second, who underta-
king a war against *Roger* King of *Sicily*
and *Naples*, after he had taken by storm
the City of *Amalphis* in *Apulia*, he there
found the chiefest and most authentick
part of the *Civil Law*, the Digests; which
was from thence conveyed to *Pisa*, and
afterwards to *Florence*, where they have
been kept with the greatest care, and had
in much veneration and esteem; ^b and
this was in or about the year, 1137.
The other parts of *Justinian's* frame and
Collection were found at *Ravenna* about
the same time.

^b M. Selden
says it is
there kept in
the Dukes
Palace, and
is never
brought
forth but
with Torch-
light and o-
ther reve-
rence. Notes
upon *Fortes-
cue ad cap.*
17. in *fin.*

These

These books were no sooner pull'd as it were out of the dust, but by the same Emperour's command, they were every where divulged, taught in Schools and Universities up and down the Empire; the barbarous Laws as it were silenced, and these in practice made the rule for all Tribunals.

And indeed the same and reputation of them so spread, all kind of learning reviving with it at the same time, that in a little space of time it got footing also with the other sciences in *France, Spain* and *Italy*, and in all the Western part of *Europe*, where it has been in greatest use and highest account, as well in studies as in Judicatories ever since, to this very age of ours. Nay, the *Civil Law* after it was once restored and taken notice of, having long lain hid and concealed, drew the hearts and studies of men after it in such a wonderfull manner, and grew to that mighty eminence and power, that the most were intent upon the study of it, and but few in comparison lookt after any other learning.

Giraldus of *Oxford* charges it as a fault upon the students of his time, and tells that one *Martin* a Clergy-man, did sharply reprove the University of *Oxford* at a publick congregation, for devoting themselves wholly to that study, neglecting all other learning; saying, *quod leges Imperia-*
les

les reliquas scientias omnes suffocaverant, the Imperial Laws had swallowed up all the other Sciences.

Also *Daniel Morlæ* in the same Century, being in *Henry* the second's time, writes, that the Law was so much studied in *Oxford*, *quòd pro Titio & Seio Aristoteles & Plato penitus oblivioni traderentur*; that *Titius* and *Seius* were minded altogether, and *Aristotle* and *Plato* were quite forgotten. And *Roger Bacon*, that had made himself eminent in all the sciences, did upbraid the Bishops of the same age, for minding Divinity so little; adding, *quòd cavillationes juris defœdarent Philosophiam*, the sophistry of the Law would corrupt the true Philosophy.

Stephen Langton Arch-bishop of *Canterbury* took up the same complaint in *Henry* the third's time; against the Monks of his time, *qui relicto agro veri Booz, nempe sacra Scriptura, ad alium agrum, id est, scientiam secularem; pro cupiditate terrena transfirent*; who through greediness of filthy lucre, which was then to be gotten chiefest from the Law, did forsake the knowledge of the Scriptures, and hunt after secular knowledge.

The like lamentation was made by *Robert Holcot* of the order of the *Prædicants* in *Northamptonshire*, in *Edward* the third's time; *leges & canones, faith he, istis temporibus innumerabiliter sunt fœcundæ; concipiunt*

concupiunt divitias & pariunt dignitates; ad illas conflunt quasi tota multitudo scholarum his diebus: The Laws and Canons are immeasurably profitable in these times; riches and honours spring from thence; almost the whole number of Scholars resort thither; for indeed the greatest professors in Theology, that were, did so little content themselves with that one way of advancement, that they did frequently assume degrees in Law, to fit and qualify them for other preferments also.

But sure it is, these complaints and oburgations of private men could so little keep this luxuriant growth of the Law from spreading, that the very Edicts and Decrees of Princes could not bring it down.

Matthew Paris in his History upon the year 1254. and in the Additions, pag. 883. *Edit. Noviss.* makes mention of a constitution made and published by Pope *Innocent* the fourth, by which it was ordained, that no professor of the Laws should be promoted to any Ecclesiastical dignity in *France, England, Scotland, Spain and Hungary*; and that from thenceforward the Imperial Laws should not be read in those dominions, if the Kings and Princes so thought fit. Pope *Honorius* the third forbade the reading or teaching of the *Civil Law* in *Paris*, in the year 1220¹.

¹ *Cap. super specula. ext. de privileg.*

Those Popes thought that the restraint of the Imperial Law, would be a ready means to bring into request the Canon Law, which was as it were but new set up. Upon design therefore to bring in to credit their own Ecclesiastical Law, rather than out of any dislike of the Civil, were those prohibitory Decrees made; however they very much failed of that effect that was intended them: for we may have observed to this very time, that all those Christian States that do acknowledge the Popes authority and power, have so equally divided their respect between both those Laws, that they have appointed to each their proper function; designing the one to be serviceable to Civil matters, the other to Ecclesiastical; and so by such moderation have done very equal right to both. At the same time that the *Civil Law* was publickly read at *Bononia* by the means of *Lotharius* the second, it was brought into *England* by *Theobald* the Arch-bishop of *Canterbury*, and being publickly read in *Oxford* by *Vacarius*, it grew so general a study, and other learning was so much neglected upon it, that King *Stephen* incensed thereat, sent forth a peremptory command, that it should be read in *England* no more, that *Vacarius* should forbear to teach it any farther, nor that it should be lawfull for any to keep any books of the *Roman Laws* by them;

* Dissertat.
ad Flet. cap.
7. parag. 6.

Sed parùm valuit Stephani prohibitio; nam eò magis invaluit virtus legis, Deo favente, quàm eam amplius nitebatur impietas subvertere, says Mr. Selden; * But King Stephen's prohibition did prevail but little; for the power of the Law, God prospering the same, waxed the more vigorous, when malice did most strive to destroy it.

Charles the ninth, and Henry the third of France, did also by sending forth their Edicts forbid the *Civil Law* to be taught in *Paris*, or that any Degrees should be taken in that faculty. Philip the Fair, and the Parliament of *Paris* anciently, did straitly charge, that no man should dare in any pleading to urge or cite the Roman Law against a special Law of the Nation. In *Spain* it has been made no less than a capital crime, to offer or alledge the Roman Law, as compulsive or binding.

And surely it is a high indignity to any Prince, to have any foreign Law set up against, and to beat down his own. And therefore in the erection of Universities in *France*, the Kings have always declared, that their purpose was to have the *Civil* and *Canon Laws* in them publicly professed and taught, to make use thereof at their discretion, but not that the subjects should be any way bound thereunto, lest they should seem to derogate from the

Laws

Laws of their own Countrey, by advancing the Laws of strangers¹.

¹ Bodin. *de rep. lib. 1. ca. 8.*

These and such like Edicts and Declarations of Princes, have been always of full force and power, as most justly they ought to be, to limit the vast and universal power of the *Civil Law*, and to keep it from getting above and prevailing over the Laws and Customs of their own Territories; for that were no less than to worship two Suns in one and the same firmament, and to call in the Roman Sovereignty, which was long ago cast off. But that the *Civil Law* should not be studied, publickly taught, no Degrees taken in it, nor cited in their Judicatories in a ministerial and subordinate way to their own municipal Laws and Customs, or that it should not be admitted to teach us true equity and sound reason, their restraining Edicts never have so far prevailed so totally to suppress it, from the time of *Lotharius* the second, the first restorer and re-establisher of it, to this present, which is now full 500 years. *Plurimum distat lex à jure*, says the same Bodine; *ius enim sine jussu ad id quod æquum bonumque est; lex autem ad imperantis majestatem pertinet*: There is much difference betwixt Right and Law; for Right without any command insinuating it self into the soul of a just man, recommendeth to that which is good and equal; but Law im-

porteth a command of some Sovereign, which may force and hurry the will to such an action, which in equity or right reason may not be good or laudable. As a Law to bind by its own proper power and virtue, or by any authority of those that made it, the Imperial Law is not admitted in any Nation. Yet no Christian Nation; with all the express Decrees that they have at any time made against it, has been able to exclude it, as it contains *veram naturalem rationem, optimum inter omnes leges humanas exemplum, equitatis normam, auctoritatem prudentum, veram justitie rationem, artem & scientiam juris, & ut bonos mores complectitur*; they all admit it, as it does propound and hold forth true natural reason, and as it is the most imitable pattern amongst all the Laws of men, the rule of equity, the voice of Sage men, the true method of justice, the art and knowledge of doing right, and as it comprehends instructions for a moral life: For thus to shut the door against it, were to renounce reason, equity, justice; and to defie all moral goodness.

Thus much may very well suffice to shew how the Roman *Civil Law* has had the singular honour and prerogative which no other Law has had, to be rescued from that universal deluge of abolition, which hath swept away all other ancient Laws besides

besides it ; and not onely to out-live *Rome* it self, but to out-stand many dangerous assaults and casualties, and divers sharp penial Edicts that have been made against it, and to continue to this very time a large and accomplished body. This surely, next to the Providence of God, who hath so disposed it, must needs be ascribed, and the cause must needs be conceived to be, some especial excellency and rare wisdom that is in the Law it self ; For else why have not other Laws continued as long, as that has done ?

C H A P. IV.

*That Foreign Nations in doing of Right
between Man and Man, do mainly
practise and make use of the Rules
and Dictates of the Civil Law.*

THat the Roman Civil Law, framed so many hundred years ago, and devised for the use of one Nation onely, is still extant and in being at this day, the state it self being quite extinct; possibly it may not seem commendation and praise sufficient, except the use, practice and observation of it up and down divers great Nations of the World be also shewed. The next thing therefore that we have to say in farther praise thereof is, that the greatest and best ordered Nations, though they manage their publick occasions and affairs of State by rules and directions of their own ordaining, having an eye to the nature of their people, way of government, and present exigencies onely; yet in the dispensation of private justice, and in pacifying the debates and differences that do arise between their subjects, where mere right and equity onely is considerable, they use and practise the rules and principles of the Civil Law chiefly.

Peculiar

Peculiar Statutes, Ordinances, Customs, and municipal Laws every State has of its own making, which in the regulation of its proper affairs it does prefer before any other Laws or Constitutions whatsoever, though in reason and convenience they may seem much better. Yet humane occurrences are so many in number, and in circumstances so greatly differing one from the other, that no Nation is perfectly supplied with Laws of their own to answer them, but that there is still need of some subsidiary Law, more universal and comprehensive than its own.

And from this ground is it, that most States have entertained the Imperial Law, to supply and assist where their own is defective; making their study and science of Law to consist in that, but the use and exercise thereof to be restrained and bounded by their own proper Laws, which every Nation requires to have first known, and chiefly to be observed. Wherefore if you travel into their States, and shall ascend up into their Courts and places of Judicature, both Judges and Advocates will be every where found to be all Civilians and Graduates in that faculty; and the proceedings in causes there, to be most after the form and manner of the *Civil Law*. And when any case comes to be resolved by final sentence, if there be any proper or peculiar Law of their

own Countrey to determine it, judgment passeth, as that special Law directeth; but if that be wanting, as commonly it is, presently recourse is had to the *Civil Law*, and by that is it both pleaded and judged.

Which because it shews the transcendent excellency of this Law, being incident to no other Law besides, and being not thoroughly enquired into, may seem incredible to many men, it is therefore a point worthy of a strict examination, and fit to be fully cleared and perfectly understood.

For peradventure it may not pass without a wonder, that a Prince or Commonwealth should not be able to manage their rule and government by Laws of their own devising; or that any differences should arise amongst their people, which they knew not how to decide of themselves, but must consult with the Oracles of other Nations.

It eclipses, some may think, the Majesty of a State, to have rules prescrib'd to it by others. And since the time that a division of Kingdoms was first made, and each had their bounds set them, no Potentate, no not the Emperour himself has pretended to a power to give Law to any, but to such as have been his subjects by birth, habitation or conquest. Neither can Laws be made to regulate the whole World, or to bind all people, says *SNA-*

rez. ^m Besides, *quæ Leges Romanis congrue-* ^m Lib. 3. de le-
bant, non omnibus jam congruunt : mutata est ^{gib. ca. 4. nu. 7.}
ratio vivendi, status rerum mutatus, says Lu- ^{& ca. 7. nu. 9.}
dovicus Vives ; ⁿ The Laws that were pro- ⁿ De caus. cor-
 rupt. art. lib. 7.
 per for the Romans, suit not so well with
 others ; the manner of living is not now
 as it then was, the state of affairs is clean
 changed, climates differ, and the tempers
 of people differ too ; new and strange
 accidents do frequently arise, which will
 require new constitutions to settle them ;
 the form of governing is divers in several
 times and places, the Laws therefore can-
 not possibly be the same ; Monarchical
 Laws are of no use to a Popular govern-
 ment ; and Popular Laws do not fit a
 Monarchical State : Severe edicts will not
 suit with a mild and gentle people ; and
 contrariwise, barbarous or untractable na-
 tures must not be dealt withall by gentle-
 ness or clemency. It may therefore be
 questioned, how the *Civil Law* that was
 made so many hundred years ago, and for
 one single Nation, can be accommodated
 to other Nations, coming in so long a
 tract of time after them, and differing
 from them in habit, language, situation,
 manners, and form of government.

Besides, to hear of the general use of
 the *Civil Law* in foreign parts, is so odi-
 ous and offensive a thing to some humo-
 rous Anticivilians, that although they be
 so learned, that they must needs know it
 to

to be true, and having travelled abroad must needs have seen it; yet to take away all belief thereof from the people of this Nation, lest they should look too favourably upon it, they do too frequently suggest in their writings, That in *France* it has been forbidden under a penalty to read the *Civil Law* to any publick audience, and those that should hear the same read, were also to undergo the same punishment; And that in *Spain* to cite the authority of the *Civil Law* in Court, has been made an offence no less than capital. But they do not add withall (which they know they may as truly) that these sharp edicts lasted not long, but grew out of use very long ago; and that the *Civil Law* does flourish no-where so much as in those two great Monarchies, and so has done for a long time together; and have both sent forth men as famous and renowned in that profession as in any other; of whom mention shall be made hereafter. For both the study and practice of the *Civil Law* has been found of such absolute use and necessity, that those States that have been brought upon some pretence of convenience to suppress it, have been glad after some little want thereof to re-establish it and set it up again.

Baldwine in his *Prolegomena* takes in all Christendom in this particular; *Religio Christiana*; saith he, *probavit retinuitque politicam*

liticas Romanorum leges, quas equitate summa subnixas & naturalium notionum honestati proximas esse videbat; easque reverita est tanquam Dei dona & beneficia: Christian Religion hath allowed of and kept the Roman Laws, which it saw were grounded upon pure equity, and came nearest to natural integrity it self, and hath ever since revered them as the gifts of God, and blessings bestow'd on Man.

Jus Civile Romanorum, says Wesenbeck, ° propter summam equitatem & prudentiam, jus quasi gentium, & omnium populorum bene institutorum commune est:

The Civil Law of the Romans, for its special equity and wisdom, is come to be as it were the Law of Nations, and of all well ordered people. *Jus Romanum tam equum est*

& rationi consentaneum, says Molinaus, P ut omnium ferè Christianarum gentium usu & approbatione commune sit effectum:

The Roman Law is so equal, and so coming up to reason it self, that by the usage and acceptance of almost all Christian Nations, it is turn'd into a general and common Law.

Hoc jus commune, saith Peckius, q quod tantis vigiliis excogitatum & inventum est, adeo bonum & equum semper visum fuit omnibus, ut

hi quos Romani imperii leges non tenent, hoc ipsum jus tanquam equitati naturali maxime consentaneum, libenter sequantur & ubique probent, suasque leges per hoc interpretentur: This common Law, meaning the Roman, invented and wrought out by so hard and so long

° *Parat. Dig. De legib. nu. 9.*

q *Ad consuetud. Paris. Tit. Des fiefs. nu. 110.*

q *Ca. 28. De Reg-jur. in 6. in princip.*

*Inst. De ju.
nat. gent. & Ci-
vil.*

*Rer. Judic.
lib. 2. ca. 1.*

long labour, has always seemed unto all States so good and conscionable, as even those Nations whom the Law of the Roman Empire does not oblige at all, do notwithstanding freely follow and approve thereof, as most agreeable to natural equity, and do interpret their own peculiar Laws by them. Particularly for France, *Equinarius Baro*^r says, that, *si more statutorie regionis aut lege Regia controversie dirimi non possint, ad jus Casareum velut ad evoulas Judices regii ceterique laici confugiunt*; If there be no custome or constitution to determine the controversie, both Judges and People go to the Imperial Law as the best that ever was. And a little after, *Jus Romanum*, saith he, *commune jus Franci appellant, & interdum absolute jus, vel jus civile, quod eo jure communiter omnes regiones utantur, ubi pactum, mos, lex regia desideratur*; We French-men call the Roman Law the common Law, and sometimes simply the Law, or the *Civil Law*, because that Law all Nations do commonly use, where agreement, custome, and particular Law is wanting. *Anneus Robertus*,^r another French Lawyer says, that some Provinces in France, either by special privilege, or by grant from their Kings heretofore made do use the Roman Laws; as the Territory of *Tholose*, and that of *Daulphine*, and some others, and these are call'd *Provincia juris scripti*, the Provinces of the written Law:

Law: some others, saith he, and indeed the most and best Provinces are governed by unwritten customs; but in the end he adds for the whole Kingdom thus, *Civile Romanorum jus in senatu & tribunalibus Francia citare licet, non quòd Romanis legibus parere necesse habeamus, sed ut equitatis ratio ex tot clarissimorum & prudentissimorum Jurisconsultorum responsis attendi & inspici queat*; The Civil Law of the Romans is alledged in the Judicatories of France, not that we think our selves bound to them, but that out of the resolutions of so many most famous and most prudent Lawyers, the rule of equity might be extracted. For Spain, *Fernandus Vasquius*, ^{one of their own} Lawyers, shall give testimony, how the Imperial Law and the Law of their own Nation goes hand in hand conjoined and link'd together: *Jus Civile Hispanorum*, saith he, *hospitio voluntari recepit jus civile Romanorum: jamque nostrum jus civile Hispanicum & jus civile Romanorum simul pariterq; coeunt, licet ex vi jurisdictionis illud recipere nos Hispani non teneremur*: The Law of Spain hath given a free admittance to the Roman Law, and now they are as it were united together, albeit there lies no tie of command upon us in Spain to enforce a submission to it.

<sup>*De succedere,
at lib. 3. parag.
26. limitat. 31.
nu. 71.</sup>

C H A P. V.

The general admittance and use of the Civil Law in foreign parts, is acknowledg'd by our selves here in England.

I Shall not travell any farther to cite any more foreign testimony, to prove that this Law is generally received and practised by other Nations; and the rather, because Dr. *Duck* in his Book, has by variety of proof so sufficiently made it good already. But yet it is worth the setting down, what some of our own Countrey-men have in their Writings acknowledg'd to the very same purpose; and those especially amongst the rest, whose interest and high valuation which they pass upon the Laws of their own Countrey, will not permit them to ascribe more to the *Civil Law*, than the just truth will bear.

And it is most observable, what King *James* himself, the learnedest of all Modern Princes, said here in a Speech made to no less solemn assembly, than his Lords and Commons of Parliament, " which we have extant amongst his printed Works. " As a King, saith he, I have least cause
" of

v 21. Marti
1609.

“ of any man to dislike the Common-
 “ Law ; for no Law can be more fa-
 “ vourable and advantageous for a King,
 “ and extendeth farther his Prerogative,
 “ than it doth. And for a King of *Eng-*
 “ *land* to despise the Common-Law, it
 “ is to neglect his own Crown. Yet, saith
 “ he, I do greatly esteem the *Civil Law*,
 “ the profession thereof serving more for
 “ general learning, and being most neces-
 “ sary for matters of Treaty with all fo-
 “ reign Nations. And I think, that if it
 “ should be taken away, it would make
 “ an entry to Barbarism in this Kingdom,
 “ and would blemish the honour of *Eng-*
 “ *land* ; for it is in a manner *lex Gentium*,
 “ and maintaineth entercourse with all
 “ foreign Nations. But I onely allow it
 “ to have course here, according to those
 “ limits of jurisdiction, which the Com-
 “ mon-Law it self doth allow it. And
 “ therefore though it be not fit for the
 “ general government of the people here,
 “ it doth not follow it should be extinct ;
 “ no more, than because the Latin tongue
 “ is not the mother or radical language of
 “ any Nation in the World at this time,
 “ that therefore the English tongue should
 “ onely now be learned in this Kingdom,
 “ which were to bring in Barbarism.

And in another Speech in Star-cham-
 ber, * printed also ; “ God forbid, saith * 20 Jun.
 “ he, the Law of Nations (intending 1616.
 “ thereby

“ thereby chiefly the *Civil Law*) should
 “ be barred in this Kingdom, and that
 “ for two causes; one, because it is a Law
 “ to satisfie strangers, which will not hold
 “ themselves so well satisfied with other
 “ municipal Laws; another, to satisfie
 “ our own subjects in matters of Piracy,
 “ Marriage, Wills, and things of like
 “ nature.

y *Ult. Mart.*
 1607.

And again, when he was so mightily pressing to have had an union of *England* and *Scotland* under the same policy of Laws, as they had but one and the same King; in a Speech made upon that subject, y extant in his printed Works, he told his two Houses of Parliament, that in point of conjunction of Nations, the *Civil Law* ought to bear a great sway; it being the Law of Nations. These are the expressions of a King, the interest of whose Crown and Sceptre, and the Prerogatives thereunto belonging did depend upon the favour of another Law; and yet he positively and in down-right terms in the face of all his people, avows the *Civil Law* to be the Law of Nations; and that all transactions of Treaty and of Trade with foreign Nations were dispatched by the rule and reason thereof; and that the authority thereof was so great in the esteem of strangers, that they would rest satisfied therewith, when no municipal Law could satisfie them. But in that he
 avers

ayers also, that when the people of *England* shall exterminate that Law, (which must needs be when the practice thereof is quite taken away or thrust into a poor narrow compass) their honour will be obscured, and they will be in danger to be over-run with Barbarism; it was never so well worth the observing, as at this present time. And it clearly shews, that wise and learned King did perfectly understand the true use of the *Civil Law*; for as the language thereof must needs be a means to maintain learning, which does civilize and soften the minds of men; so there is no sort of learning with the which the matter of it does not correspond and participate; but above all it does afford more and better rules for civil living and orderly conversation amongst men, and for righteous dealing each with other, than any other study or learning whatsoever.

But this practice and usage of the *Civil Law* in foreign parts is yet better confirmed by the authority of those, who studying and professing the Law of *England*, have been always jealous of the rising and growth of the *Civil Law* in this Nation. For though they have desired to keep it low here (for what reason I need not mention) yet some of them have freely enough owned, how much it is in use and practice in other Countries.

Q

Sir

Sir Francis Bacon in his Epistle Dedicatorie to the Queen, set before his Maxims of Law, after he had told the Queen, that *Justinian* the Emperour did gloriously, and yet aptly call the Body of the Roman Laws, *proprium & sanctissimum templum justitia consecratum*, a true and a most sacred temple consecrated unto justice; he says, that it is a work of great excellency indeed, as may well appear, in that *France*, *Italy* and *Spain*, who have long since shaken off the yoke of the Roman Empire, do yet nevertheless continue to use the policy of that Law.

My Lord *Ellesmere* Chancellour of *England*, as Sir Francis Bacon was, in his Speech of the *Postnati*, does expressly deliver, that the *Civil Law* is taken to be the most universal and general Law in the World.

Sir *John Fortescue* himself, Lord Chief Justice of *England*, and afterwards Lord Chancellour in King *Henry* the Sixth's days, in his book, wherein he does so highly magnifie and commend the Laws of *England* above the *Civil Law*, yet he could say, * That *Civiles supra humanas cunctas leges alias fama per orbem extollit gloriosa*; The *Civil Laws* throughout the whole World, are advanced in glory and renown above all other mens Laws.

* De Laud. legum Angliæ. ca. 9.

* In his parallel part 1. Epistle to the Reader.

Fulbeck also, another of the same profession, and of great learning, does agree with the former in these words; * The Roman

Roman Laws, saith he, in the times of *Arcadius*, *Theodosius* and *Justinian*, recovered their strength; and shining to all the Common-wealths of *Europe*, as the Sun to all the Climates of the Earth, have for their worthiness, and necessary use and employment, received entertainment, countenance, and great reward of Emperours, Kings and Princes.

Likewise Mr. *Selden*, a Graduate in the Common-Law, but a great Student in all learning, and one that seems to have searched narrowly into the state of the *Civil Law*, as it has stood in use and request in other Countries as well as in *England*, in all times, in his additional discourse upon *Fleta*, wholly spent upon that subject, owns the entertainment and use of the *Civil Law* in the Western Countries of *Europe*, that had left to acknowledge the Roman Empire long before. For in that discourse^b he hath these words:

Ca. 6. pa.
rag. 4.

Ita jam, id est sub annum 1145, receptus fuit juris Justinianei usus, ut quoties interpretandi jura sive vetera sive nova sive ratio sive analogia desideraretur, aut mos aut lex expressior non reperiretur, ad jus illud Justinianum tum veluti rationis juridice promptuarium optimum ac ditissimum, tum ut quod legem in nondum definitis ex ratione seu analogia commodè suppleret, esset recurrendum. Certe ita ferme Rhodiam recepere veteres Romani legem in rebus nauticis, ut etiam apud nos & gentes

vicinas leges recipiuntur Oleroniana; cum interim nec hæ nec illa ex auctoritate sui, quæ primò condita sunt, vim sic obtinuerint. Atque ut Academia demùm non pauca alia per Europam Occidentalem hac in re, quoad studiorum institutionem, Bononiensem; Ita etiam Regna alia & Respublica imperium Casarianum quoad usum juris ejusdem aliquem imitata sunt, retentis semper ac ubique moribus aliàs avitis legibusque sibi, pro varia regiminis cujusque formula, ante conditis, novâsque condendi tum libertate tum usu. Neque ullibi pro simplici juris norma in Occidente inde usurpatum est jus illud Casareum, sed cum temperamentiis quæ jam diximus: That is, About the year One thousand one hundred forty five, Justinian's Law came to be used in the Western part of Europe, in such cases, as either the State had made no special provision at all in them, or that there was no custom to resolve them by; or where in default of both the case that fell out was to be settled by right and sound reason, or by some other cases that in all circumstances did resemble the matter in question; or lastly, where the local Statutes themselves were not so clear, but that they stood in need of interpretation, and were so doubtfully penn'd, that solid reason and a deep judgment was to be made use of to explain them. In all which cases recourse was had to the Law of Justinian, as to the best and richest Treasury
of

of legal reason and equitable knowledge ; and which could best supply the want of a peculiar Law either with concludent reason, or with paralleling the case in question with other expresse cases of the Law, as did exactly suit therewith. Much after the same sort were the *Rhodian* Laws embraced by the ancient *Romans* to regulate such matters as fell out at Sea, as the Laws of *Oleron* have been in *England* and elsewhere ; when as notwithstanding neither the one nor the other have had such a binding power in them, as they had when and where they were first ordained. And as many Universities at last were guided by that of *Bononia* (where learning, after it had lain a long time neglected, was first revived) in setting up the teaching and reading of all kind of literature ; so did also other Kingdoms and Commonwealths in some measure make use of the *Civil Law*, as the Empire did, reserving to themselves such old Laws and Customs, as they had proper to their several forms and ways of government, and the freedom of making new, which they practised as oft as they had occasion. Neither, saith he, has that Imperial Law been at any time since observed in the Western Countries for a positive commanding Law, but ever under the rules and limits before spoken of.

c Lib. I. ca.
24.

The same Mr. Selden also in his *Mare Clausum*,^c although he will have the European Nations to practise divers things very opposite to the *Civil Law*, as that there are no Slaves now, or right of personal Postliminiage, as were by the *Civil Law*; and that Goods cast away at Sea, do by the Customs and Ordinances of many Countries accrue to the Princes themselves, which by the course of the *Civil Law* were restored back to the owners, or if they claimed not, went to the first occupant; yet he commends the Princes of Europe for establishing the use of the *Civil Law* in their Academies, and in their Tribunals so far, as their own peculiar Statutes were not contrary thereunto.

a Ca. 7.

I cannot also omit what Mr. Selden writes in his Review upon his *History of Tythes*;^d Where though he vehemently declaims against the gross ignorance of those, that do not stick to publish here in *England* commonly, that all other States are governed onely by the *Civil Law*; and would have such to understand the difference betwixt the use of Laws in study or argument, and the governing authority of them: yet he acknowledgeth, that in the Empire and a good part of *Italy*, through the power of Emperours and Popes, the authority of the *Civil Law* doth still continue; and that in *Portugal* the *Roman Civil*

vil Law is authorized by an Ordinance of State, in cases which are not literally comprehended in the customs or constitutions of the Kingdom. And as for other Christian States, which acknowledge no superiour, or any subjection to the Empire, as *France, Spain, Denmark, Poland*, the City of *Venice*, and what also in *Germany* hath made it self free from the Empire, though as it is Law, he will not have it to bind or rule with them; yet he saith, in all of them, the reason of it brought into method, is used and applied commonly to argument, when any of their Customs or Statutes come in question; because the practisers studied it in the Universities, and had thence their degrees given them. And so the old Imperial Civil Law *valet pro ratione, non pro inducto jure*; & *pro ratione*, onely *quantum Reges, Dynastæ, & Respublica intra potestatis suæ fines valere patiuntur*; that is, it is of force as Reason, not as an introduced Law; and no farther as reason, than as Kings, Rulers, and Commonwealths will have it to prevail with in their several Territories.

And yet the same Mr. *Selden* also saith within very few lines after, that doubtless custome hath made some parts of the Imperials to be received for Law in all places, where they have been studied. And albeit he be very vehement in asserting, that Justice is administred in every

State by its own peculiar Laws, yet he admits also, that the interpretation of those Laws in most places, save *England* and *Ireland*, hath of late time been much directed by the reason of the Imperials, and onely by the reason of them, and not by their authority; and that also in case where they are not opposite at all to the special Law of the place, but seem to agree with the Law of Nations or common reason. And he grants moreover, that ever since *Frédéric Barbarossa's* time (which is near 500 years ago) the *Civil Law* has grown into a common profession in this Western World.

C H A P. VI.

The Civilians themselves do not enlarge the use and practice of the Civil Law in foreign parts, farther than Mr. Selden himself in his Writings grants it to extend.

FROM what has been cited out of Mr. Selden, it does appear, that there is as much granted by Mr. Selden to the Civil Law, as ever was challenged by any Civilian, or ever ascribed to it by any, or that any can wish to be granted to that profession in any Nation.

He in effect acknowledgeth, that when the use thereof came to be renewed in Europe with other learning, it was found to be so rich a Treasury of reason, judgment, and true natural equity; and so usefull for all matters that respected Civil society and government, that by the knowledge and direction of the Civil Law, and the rules and principles thereof they knew how to supply with resolution such cases, as their National Laws had not made any provision at all in; or if they had, but were dark or intricate, this would help to explain and illustrate them; which neither common reason nor any other humane

mane learning would enable them to do. The Universities have therefore since made it their common study, and commonly given degrees in it, and have sent forth the professors thereof into all Tribunals to be the Ministers of right and justice there, till now at last it is grown to be a common profession throughout *Europe*. And though the original authority which it had in the *Roman* State, is quite worn out, no State being now subject to the *Roman* Sovereignty; yet Mr. *Selden* does admit it to be entertained for a binding Law by Ordinance in some places, that stamp that authority upon it which of it self it hath not; in others usually observed as a Law by custome and practice; but where it passes not for Law neither way, there the reason and wisdom thereof prevails, and every man suffers himself to be convinced thereby, *non vi necessitatis sed vi rationis*, nor forcing the will, as a Law does, but as by reason powerfully working upon, and at last controlling the understanding.

Thus far goes Mr. *Selden* himself; and by no Civilian has a greater latitude than this been ever given to the *Civil Law*. For what King *James* spake to his Parliament in the year 1609, touching this matter; That there was no Kingdom in the World, not onely *Scotland*, but not *France*, nor *Spain*, nor any other Kingdom governed merely
by

by the *Civil Law*, but every one of them hath their own Municipal Laws agreeable to their customs, as this Kingdom hath the Common-Law; we all unanimously own to be true.

And what he told them of *Scotland* in particular, in the year 1607. may be as well and as truly spoken of all the States in *Europe*. If a man, saith he, plead there, that the Law of the Nation is otherwise, it is a bar to the Civil; and a good Chancellour or President will oftentimes repell and put to silence an argument that the Lawyers bring out of the *Civil Law*, where they have a clear solution in their own Law. So as, saith he, the *Civil Law* in *Scotland* is admitted in no other cases, but to supply such cases, wherein the Municipal Law is defective. This is generally reported by others, never questioned by our selves: For we are of opinion, there is no people in the World governed singly by any one kind of Law whatsoever, nor indeed can be; much less can any State be totally governed by the *Roman Law*, but that there must needs be a superadded and a peculiar Law, especially as to government, suiting with the climate it self, the nature and manners of the people, the fashion and form of publick actions, divers accidents of the time, and sundry other occurrences. Nay, we often see it fall out, that some certain Laws that are speci-

pecially made for a people, and at their first ordaining are found to be most excellent and very wholesome Laws; yet in process of time through alteration of things, and the very persons themselves for which they were originally made, it is as great wisdom and as necessary to change them, and quite take them away, as it was at first to devise them. It is no wonder therefore, that divers parts of the *Civil Law*, that were accommodated to the nature of the *Roman* People onely, and the usages then in being, should prove incongruous to the men and to the affairs of this present world, which is of a clean different face and nature. For instance:

A *Roman* Subject was not such a supreme moderatour amongst his Children, nor such a free disposer of his own estate, as that he could make his Will thereof, as he pleased, preferring one child, and excluding another, or parting it too unequally amongst them, or gratifying some stranger without remembring any of them.

If therefore a child were quite left out of his father's Will, or were especially disinherited, but without any cause mentioned, or upon such a cause as the Law did not allow of, or if upon a legal cause, yet not such as was true in fact, the Will

** Wesemb. parat. Dig. de liber. & posthum.*

was void and null. * The just portion or share that every child might expect from his father, if he made a Will, and which he

he could not give from him without law-
full cause, was, if there were but four chil-
dren in all, or under, an equal share in the
third part of his whole substance, both
Land and Goods; (for at *Civil Law* they
both came under one reckoning, and went
one and the same way without any dif-
ference) but if there were more than
four children, then a full half of the whole
estate was equally shared amongst them
all ^f.

^f *Novell. De
trient. & se-
miss. parag.
hac nos.*

If less was given to any child than this
just proportion, or if it were clogg'd with
any condition, or time of payment, where-
by it could not come presently and freely
to him, the Will was not absolutely void,
§ but a complaint might be brought to re-
store him to his just and equal share, and
to have it presently and absolutely with-
out condition, incumbrance, or day for
payment given ^h.

§ *L. omni mo-
do. Co. de in-
offic. testam.*

^h *L. Quoniam
in prioribus.
Co. De inoffic.
testam.*

But in those Nations and Countries
where the subjects are such free and ab-
solute proprietaries of all the estate they
have, that they can dispose of the same
how they will, even from their own chil-
dren, and to them in what inequality they
will, these tender and indulgent dictates
of the *Civil Law* are useless and unsuita-
ble. Those Titles then and constitutions
of the *Civil Law*, that treat on that sub-
ject, *Dig. & Co. De lib. & posthum. hered.
inst. vel exhared. De exhared. Lib. De Inoffic.
testam.*

testam. are not capable to receive any practical use or application in those Territories.

¹ *Cujac. lib.*
11. obs. 58.

Again, the greatest punishment that the *Romans* inflicted upon simple theft, was to pay four-fold, where the thief was taken in the act it self, or at least seen, and cried out upon before he got out of sight, ¹ or if otherwise the theft was not so manifest, to pay double the value of that which he stole, and the reparation was made onely to the party damnified. And if there were divers persons taken or discovered to be actors of one and the same theft, they all underwent but one and the same penalty amongst them, yet either of them might be sued for the whole ².

² *L. 21. parag.*
9. Dig. de
furt.

¹ *L. Si pignore.*
54. Dig. De
furt. parag.
furtum autem.
Inst. De oblig.
quæ ex delict.

But by the *Civil Law* it is not onely theft, privily to take and carry away something that is anothers with an intent to defraud him of it; but it is a theft also, when one that has lent money upon a Pawn does employ the pawn to any private use of his own; or when one that is intrusted with the safe keeping of any thing for me, does use or wear it himself; or when one has borrowed a thing of me for a certain use, and he does otherwise imploy it, or for a certain time, and he detains it longer, or carries it whither he should not, and farther than he promised to do ¹.

How.

Howbeit, though *Justinian* will not have any theft punished with the loss of life or member, ^m yet he leaves Highway-men, and breakers into houses, and pyrates at Sea, to be chastised by death; ⁿ for such acts as these are accounted more than theft by the *Civil Law*. And for want of ability to make pecuniary reparation, he will have all thieves punished at the Judges discretion, ^o corporally not capitally. Surely then in a case of simple theft it were very improper to bring into argument, or to cite any Text of the Civil Law *De furtis*, in any State or Countrey, when theft is look'd upon rather as a publick crime, than as a private injury, and is punished with death it self, without any satisfaction made to the party.

Likewise Slavery, as it was under the *Romans*, not suiting with Christian Religion (which looks upon all men alike, proceeding from one common parent, and created for one and the same end) is in all Christian Nations worn out and abolished. Because it seems to be against Christian charity, and that brotherly communion which we stand obliged by to one another, to exercise such an absolute dominion over any, that nature and religion has made our equals.

Those hard and severe Laws of servitude therefore, which were in use amongst
the

^m *Novell. 134. ca. fin. vers. pro furto autem.*

ⁿ *Ca. Vlt. No. 134. l. Dig. ad l. Cornel. de sicar.*

^o *Lult. Dig. de furt. l. 1. parag. generaliter. Dig. de pen.*

¶ L. 32. Dig.
de reg. ju.

¶ L. 209. Dig.
de reg. jur.

the *Romans*, whereby Slaves were excluded from the participation of any civil right whatsoever, [¶] and could not so much as marry, nor have any estate of their own, nor bring any action or complaint in their own name, but as to civil communion were accounted as plainly dead; [¶] wanting in a Christian Commonwealth, that subject matter for which they were first ordained, they must needs fail also of their use and vigour, and be esteemed incongruous and improper there.

These and such-like instances do shew, that the Law of a Nation must necessarily be fitted to the government of it, and to the disposition of the people, and such affairs as they use to deal in; and that it is not possible, that the *Civil Law* alone, without the help of a peculiar Law proper to each Nation, should be sufficient to steer and carry on all the affairs of every Nation, so differing from, and as I may say, directly opposite to the *Roman*. But what are a few instances of Laws abrogated, or out of use, and that sometimes but in part neither, and which chiefly refer to public Government, to a whole Body of Justice, both distributive and commutative, which that Law comprehends and takes in?

C H A P. VII.

No Municipal Law is sufficient to meet with the multitude and variety of cases and questions that will happen at Land, at Sea, and in foreign parts: Which has caused so many Nations to make use of the Civil Law, where it is proper and pertinent to their affairs, to joyn with and help their own; rather than to be without any Law at all, and to be subject to the mischiefs of arbitrariness, folly and violence.

IT is the Practice of the whole world to adhere and stand to the dictates of their own Laws, and in no case to admit of any other Rule; either of *Civil Law*, or acutest reason against that which their own National Laws have declared and directed to be done. But then it is visi-

*Nec judici-
bus contra le-
ges judicare,
nec de legibus
in republica
probatas ac
susceptis dispu-
tare fas est.
Bodin. de
rep. lib. 1. ca.
10. in fin.*

der, and comprehends so little, that the number of cases that are expressly resolved by Law, is not by many degrees comparable to the number of those, that do frequently and almost daily happen, wherein the Law of the Nation has not made any decision at all.

Sir *John Davis* in his Preface to the Irish Reports, does not stick to acknowledge this to be most true in the Municipal Law of *England*, though in his praises of it he sets it above all the Laws of the World besides. For, saith he, if the Rules and Maximes of the Law were a thousand times as many as they be indeed, yet would they carry no proportion with the infinite diversity of mens actions, and of other accidents, which make the cases that are to be decided by the Law. How great need is there therefore to keep the *Civil Law* in *England* still, that out of its store and plenty it may be instrumental to resolve those doubts and questions of right, which as yet have no special Law of the Nation made for them?

Indeed as the humours and inclinations of men do differ, and their occasions are divers, and the ends they pursue various, and the way and course they take to obtain them, not the same; so is it impossible, that the actions that proceed from them, should be like and uniform, but must needs, as their causes are, be various and disagreeing:

disagreeing: From whence it happens, that every day produces such accidents, as though they be not wholly new, yet they come accompanied with one circumstance or other, that makes them differ from all that went before them. Besides, Nature it self brings forth some variety of contingents without any act of man.

All which being of several natures, and differently circumstantiated from what is past or could be thought of, though they do too frequently happen and intermix with the affairs of men, yet to supply them with a direct peculiar Law, or any other express and determinate rule to settle them, is an enterprize that was never undertaken by the wisest Law-givers that have been; nor can possibly be effected by any society of men whatsoever. For it cannot be understood, how such things can be the subject of any established Law or rule, that cannot be foreseen, neither what, nor when, nor how they will come to pass. *He varietates infinita nullis legibus, nullis tabulis, nullis Pandectis, nulla librorum quantumvis imensa mole ac multitudine capiuntur*, says *Budinus*; These infinite varieties can in no Laws, no Tables, no Pandects, no Books, be they never so many or so voluminous, be all of them contained or comprehended.

And again *Non magis legibus singula con-*

Legislator non potest omnia declarare; quia res in quibus versatur, sunt prope modum infinita; & quia in hac vita mortali nihil est perfectum; & propter ingenii imbecillitatem non possumus cuncta rimari. Mantic. de tacit. & ambig. convent. lib. 1 Tit. 1 §. nu. 19. De rep. lib. 6. cap. 6.

Ibidem.

*tineri possunt, quàm infinitum quiddam & im-
mensum ab eo quod finibus exiguis, at veluti
cancellis angustissimis conclusum est,* says the
same Bodinus; No easier is it to collect
all the several cases into one book of
Laws, than to comprehend that which
is in greatness infinite, in that which lies
in a most narrow compass, and is as it
were in straitest bounds shut up. And yet
since there is a necessity of settling such
various and so unlike contingencies, some
rational way or rule must be found out
whereby to compose and settle them, lest
they should be made subject to mere will
and pleasure, or in default of better means,
men interested therein should be left to
right themselves by forcible and violent
ways.

It is no less evident and manifest, that
whilst we have to deal with foreign States,
as ordinarily we doe in the way of trade
and commerce, and too frequently in the
way of War too, questions and contro-
versies without number do arise, some
whereof do concern and reflect upon the
States themselves, as being of publick
concernment; others be of a more
private nature, and do concern the inte-
rest of some subjects onely. But when
such controversies of either kind do hap-
pen, is there any Municipal Law capable
to decide them? should we not as much
disdain to be judg'd by the Law of

France

France or Spain, when we have to doe with them, as they would to be over-ruled by ours, when they have to doe with us? Nay, should we not abandon the society of such a Nation, that should tye us to their own Laws, in matters that are transacted and done out of their proper Territory, as happily upon the open Sea, or in the Territory of another Prince and People? Of what force or power can a Law be to those who are not subject to the authority of those that make it^w?

And yet when we fall into their hands, and controversies are moved against us in their Tribunals, we must inevitably stand to and abide their justice, and the like they owe to ours: But then right must be done by such rules and principles, as both sides may be fully satisfied in the equity of them.

^w *Ubi cessat
jurisdictio sta-
tuentium, sta-
tuti dispositio
non obtinet. L.
fin. Dig. de
jurisd. omn.
Judic. l. 1.
Co. De susp.
fut.*

Here therefore does appear the true use of the *Civil Law*, and the ground whereupon all Nations have admitted it into their Courts and acts of justice: For although it cannot be said, that there is no case which is not contained in the *Roman Law*: *Neque leges neque senatusconsulta ita scribi possunt, ut omnes casus qui quandoque inciderint, comprehendantur; sed sufficit, & ea quæ plerunque accidunt, contineri*; says the *Civil Law* it self: * Neither Laws nor results of Council can be so sufficiently framed, as to provide for all cases that

^{*} *L. 10. D. de
De legib.*

shall happen hereafter ; but it may suffice, if such cases be provided for, as in contingency are most familiar and common : yet such is the copiousness of that Law, beyond any that has yet been ; and such a wonderfull enlargement has been made thereof by the professors of it in all ages ever since, as cases and accidents of all sorts and natures, and in all Countries, have happened from time to time, from study, argument, and the severall resolutions of foreign Courts applied thereunto, and all upon the reason and equity of that Law which was written by the *Romans* ; that now it may be justly thought, no case can fall out or accident arise, which the learning of that profession thus polished and perfected, either in express terms, or by parity of reason, will not determine. Wherefore it is upon just reason, and likewise upon necessity too, that so many Nations have recourse to the wisdom and fulness of that Law thus amplified, as oft as their own particular constitutions fail them.

And although there are a sort of men in the world (who indeed have some good natural abilities in them, as a ready apprehension, a quick wit, a holding memory, and a smooth elocution, but were never brought up either in Law or any learning) yet they do much presume upon that ordinary and common understanding

ing which they have, that they think, or at least they would have the World believe so, whereby they may be thought worthy of the best places of Judicature, that they can by the strength of their poor illiterate reason resolve all questions and doubts of Law whatsoever, whether they arise at Land or at Sea; be they of publick concernment or of private; entrenching upon our own Law, or touching upon the Law of Nations; be the case between Prince and People; subject and stranger; one State and another; clear in Law or ambiguous; settled by exprefs constitution, or left undecided; yet their capacity, as they would have it conceived, without any such help as the *Civil Law*, does suffice for all.

And yet when these presumptuous and high conceited men do sit to judge and administer right on such matters, they quickly find what they would not before believe, or at least not have believed by others, that their understanding is too narrow to comprehend such difficult things, and their insufficiency to be too great to determine them: and are therefore driven to consult with the learned of that profession, to whose skill it does belong, not without some shame to themselves. And it were to be wished, that the onely effect of such mens ambition and confidence might rest there, and that it did no

greater mischief. But it commonly falls out to be fatal to the interest of many, which is taken away or prejudiced by their error and ignorance : and sometime States also are embroyled in war and hostility each against other by their unskilfull managery ; *Ignorantia judicis plerunque est calamitas innocentis*, says St. Austin ; ¶ the ignorance of the Judge is frequently the woe of those that are innocent.

¶ De Civit.
Dei. lib. 19.
ca. 6.
41

And indeed though it be nothing else but reason, that does render a man capable and fitting to discuss and pronounce upon such questions, yet it is not the vulgar and common reason that nature does bestow upon every man ; but it is that reason which is gotten by art and study of the Law and of the rules and principles of justice, and which is improved and enlightened by a continual use, and a long experience, and which in truth is to be found no where but in Students, Practisers and Judges of the *Civil Law* onely.

And yet there has been a strong conceit, taken up but lately, but yet very hotly pursued, to have the same take effect, by soliciting the state to make a Law to that purpose ; that a certain number of old experienced Merchants are much fitter and better enabled to sit upon the tryal and examination of matters of foreign trade and negotiation, and of business

ness arising upon or beyond the Sea, than any students, graduats, or practisers in the *Civil Law* whatsoever; supposing, that if the Court of Admiralty were turned into a Court of Merchants, both subjects and strangers would be better satisfied, and trade go on and thrive much better.

Which project some Merchants have been the more emboldened to set on foot, because they once prevailed so far, as to get an Act of Parliament to be made in the fourty third year of Queen *Elizabeth*; whereby all controversies that should from thenceforth arise upon any assurances made of any goods, merchandizes, ships, and things adventured, are committed to the hearing and tryal of so many Judges, whereof the Civilians are fewest, and the Merchants make the greatest number. They would have it conceived, that none has understanding or skill enough to judge of the mystery of their employment but themselves only; and that it is equity and a good conscience, in a most summary and a compendious way, and not the intricate and long Meanders of the Law, that is the fittest to arbitrate and decide their differences; crying out for a quick dispatch, that their voyages to Sea may not be obstructed. They are jealous withall, that the profession of the Law is but a design
to

to enrich a company of men with the vexations and spoils of others; grudging, that there should be a distinct profession made of the Law, which secures themselves and all they have, when every Trade and Handicraft hath the like.

In which suggestions if there could be imagined to be any either truth or soundness, yet since the same may be made by other trades and professions as well as by the Merchants; it would argue, that there were by the State too great care had of them, and too little had of others, to assign the Merchants onely Judges out of their own order, and not to grant the same privilege to other Tradesmen also. And yet to make a peculiar provision general, and to erect so many Tribunals as there are Trades and callings, was never as yet accustomed or put in practice by any Nation.

The Romans would not admit any Barterers or Traffiquers in the Camp, or to any place of honour in the Civil Government. ² *Paulus* ³ gives the reason; *Id genus hominum, faith he, ad lucrum potius vel inopiter faciendum prouius est*; That sort of men are disposed to gain, and unrighteous dealing. Saint Chrysostome says no less, as Gratian cites him, *ca. ejiciens. Distinct. 88. Adreorator sine mendacio & perjurio esse non potest*; No Merchant can subsist without lying and perjury: And Demosthenes

² L. 12. Co. De Cohortat. 1 vinc. Co. Negotiat. ne Militent.

³ L. 44. Dig. De adilit. e. dist.

most honest^b makes it a miracle, *si idem mercator industrius videatur & probus*; if that man that is sedulous and intent upon Merchandizing, can be an honest man. And therefore the *Thebans* would not suffer any man to bear any honourable office in their Common-wealth, that had not quite given over Merchandizing for the space of ten years.^c Surely their fear was, that when those kind of men studied and endeavoured nothing else but amassing of wealth and getting of riches, the Tribunal, if they sate there, might become a Mart, and justice be exposed to sale.

^b Orat. pro Phormione.

^c Arist. Polit. lib. 3. ca. 3. in fin.

Besides, it is most frequent and ordinary for a number of Merchants to joyn in copartnership together, and to employ one common and joynt stock beyond the Seas, and yet few of the copartners known or taken notice of; so that it may happen, that a Merchant, that sits on the judgement seat, may be deeply concerned in the case in question, and be judge in his own case, and yet his interest not seen or discerned.

Again, there is such a spirit of opposition reigns between the Merchant and the Mariner, who is as usefull and serviceable at Sea as the Merchant can possibly pretend to be, that if the Merchant should sit to judge the Mariner, in time, the company of poor Mariners might be so severely dealt with, and kept with such short wages by the

the Merchant, at whose pleasure and command he is, that he will not care to serve, and so navigation may be quite lost.

Nay farther, the Controversies in the Admiralty are not between our own Merchants onely, but many times between our own and other Merchants of foreign Nations. Whereby, if ours were Judges, there would be given into their hands a great advantage to help and gratifie those of their own Countrey and rank, and to oppress strangers.

Moreover, what affinity is there between buying and selling, (which is the onely skill of the Merchant) and judging of the nature and right of contracts, injuries, debts, agreements, offences, and other accidents and emergencies happening upon the Sea or in foreign parts, which they so covet to gain unto themselves? Which knowledge and faculty is not to be found in the depth of the Ocean, nor to be obtained by Travel, but is gotten by serious contemplation and a long study, and perfected by the practice of a man's whole life.

I write not this to debase the true worth, nor to lessen the repute of Merchants. They are a people that enrich the Nation as well as themselves; and for the dangers they run through, both personal and real, they deserve to have the highest immunities conferred on them. But let
them

them keep within their own sphere, and not aspire to such a function, which neither their breeding, capacity or parts does enable them unto, nor their employment gives them leisure to discharge. ^d And therefore upon a solemn debate, whether Merchants should be joined to Civilians to try such matters, it was denied, and judg'd against in *France*, in the year 1584.

^d Robert. Rer.
judicar. lib. 2.
ca. 16.

Besides, that it should be thought that men (whose knowledge of the Law, and skill to doe right and justice is no greater, than bare nature and their illiterate education has afforded them) should be able to doe it quicker, and at less charge to those that seek it, than those that have made it their whole study and employment, is to me an imagination strange and beyond belief; for unquestionably the skilfull and expert Judge, that by his study and practice is accustomed to such business, as he does best understand it, so he must needs soonest dispatch it also. Because custome and knowledge hath made all things of that nature obvious and easie to him; and such a Judge will not allow any thing to be spoken impertinently and beside the matter in question; and so a multitude of business goes off quickest under him, and both delay and much charge is avoided. But when they come to judge thereof, who never meditated or dealt in such things, it must needs be, that they must

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run into many impertinent questions, and that they must toil and perplex themselves to understand the true point in issue; meeting every where with knots and difficulties, and scarce any thing that is easie and clear to them; whereby they cannot without long and frequent debates and much time spent, resolve any case in question. And though it be rightly decided in the end, which it is twenty to one if it be, and is an act of chance rather than judgment; yet in a multitude of other business, before any comes to be judg'd, the attendance, I am sure, is most tedious, and the charge intolerable: so that to put the Maritime and Foreign affairs to be judg'd by Merchants, is to augment, delay and charge, rather than to lessen either.

In like manner, those that study and profess onely the Law of their own Countrey, (which, as I said before, is commonly but of narrow extent, and serves but for a few particular occasions onely) may be as justly deemed incapable to judge and sit upon trial of such matters (though they do concern the dispensing of Law and Justice too) wherein the Municipal Law is silent, and has made no provision at all; or peradventure is not capable to make any determination in them; as when they fall out upon the main and open Sea, or in a foreign State, or are controversies arising

arising between two several Nations, or their Subjects, to which no Municipal Law can be applied. In brief, where the Laws stand distinct, and the professions thereof distinct also, the exercise of them ought not to be confounded by the ones thrusting into the others function and calling. And therefore much less reason have they to prohibit the Civilians, who have the knowledge, the trial of those cases; and assume it to themselves who have it not.

Hereupon therefore we say it is, that though every Nation has Laws and Statutes of their own, proper for their affairs and people, and those within their several confines, so far as they do prescribe, have the pre-eminence above any other Law or Reason in the World, as has been said before: Yet there is no foreign Nation in the World, that has a distinct study and profession of the Municipal Law of the Nation, apart and divided from the *Roman Civil Law*: neither are there anywhere else Students and Professours of any Municipal Law distinctly so called and dignified, as there are in *England*. But the study and profession of Law that is to be found in the other parts of the World, and is serviceable for the government of the Civil State, is the study and profession of the *Roman Civil Law* onely.

All which, and whatsoever else we shall say hereafter to the same purpose, we would have understood as humble proposals onely, to be considered of in order to a future settlement, which we hope and long for. But if the Authority of this Nation (who best can judge what is fittest for the people, and what suits best with the present Government) shall in the end commit and dispose of those Trials which formerly did belong to the profession of the *Civil Law*, into the hands of others, that do not partake of that excellent knowledge; it does behove all persons to sit down satisfied therewith, and to submit unto it, without any murmuring or disputing; for I do greatly approve of that golden saying of the *Civil Law*.

l. 3. Co. De e Disputare de principali judicio non oportet.
et im. sacrileg. Sacrilegii enim instar est, dubitare an is dignus sit quem Imperator elegerit; No man ought to question that which the supreme Magistrate has once decided. For it is a kind of sacrilege to doubt of that person's merit; whom the highest Magistrate by his immediate election has thought fit to dignifie.

C H A P. VIII.

The Reasons are strong and weighty, upon which so many Foreign States do direct and order the business of their Tribunals most by the pre-script, reason and equity of the Civil Law.

IT is from the *Roman Civil Law* that the Students in foreign Nations do derive their first principles of Law and Justice; and in this are all publick Lectures read, and Degrees taken; and not in any Municipal Law.

Yet it is true, that before they practise or sit in places of Judicature, they reade; and thoroughly inform themselves in the Laws of their own Countrey; by which; where there is positive and expresse constitution in the point, their pleadings and judgments must be directed wholly. But in cases where there is none, as the cases be but few where there is, in comparison of those where there is not; or where that which is, is either in sense ambiguous, or in words obscure, and must be interpreted; or where no Municipal Law can be of any force or use at all, as in the cases above specified, there they generally
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make the *Civil Law*, or the reason thereof, their onely rule and guide, to administer right and justice by both to their own People, and to Foreigners also.

To this they are led by divers necessary and most important reasons.

First, for them to doe so, is but answerable to their education, as they are all Civilians, and to those principles which their learning hath ingrafted in them: For since they have been bred and disciplined under it, it is no wonder if their judgments and results be steered by it: it being natural, that waters should have the true relish of the fountain from whence they flow. And therefore when the learned of that profession sate in divers Judicatories of *England*, distribution of justice was ever after the same rules in such cases; wherein no special Law was, or could be made to guide them.

Secondly, It cannot be devised, how such cases as neither the Law nor the custome of the place has specially provided in, can be well understood, and receive a true and right judgment, without the help of that profession. All other learning besides that is taken up in the consideration of things that are clean of another nature; and does not consider what dealings there are between man and man,
sub-

subjects and foreigners; and what justice and equity does require in each of them, as that exactly doth.

As for vulgar and common reason, it is of use in matters that are obvious to sense, and to the first apprehension, and which are ministerial to the maintaining of life and livelihood. But where the discursive faculty must be employed, and great reasoning and a long experience is required, as in the things we now speak of, ordinary reason, if we presume upon it, will sooner lead us into error, than be any advantage towards a solid and right judgment. Nay, so unable are the common capacities to discern and judge of them, that it is usual for the Judges of the Law themselves to be at a stand, and to spend some time in study and counsel, ere they can resolve some questions that do arise; so intricate and perplexed are they.

Thirdly, It is the nature and practice of all States and People, besides their own proper Laws, to use such as are common to all other Nations and men, and so no strange thing to cherish two Laws in one Common-wealth, as some do too vainly imagine. *Omnes populi, qui legibus & moribus reguntur, partim suo proprio, partim communi omnium hominum jure utuntur*, says just. & jur. Gains; ^f and Justinian: [§] All people that are guided by any Law or custome at all, ^{are}

[†] L. 9. Dig. de

[§] Parag. 1.

^{Inst. de jurat.}

^{gent. & civ.}

are guided by a Law common to others, as well as by that that is peculiar to themselves; for if the Law of a Nation be not universal enough (as indeed none is) but that in the ministration of justice there will every day arise such questions, which the particular Law has not touch'd upon; if there be not some other Law to fly to, there must necessarily ensue either a failure of justice as to those cases, which would draw on a self-revenge; or else the settling them must be arbitrary and at will, which a people will not long endure.

Besides, there is no Nation in the World, that abounds with all things. There is no people so well fortified, but that they may stand in need of the assistance of others, either in matter of commerce, or to join in opposing a common enemy, who watches to destroy them both. Whenas therefore the imploring of this foreign help, or the transportation of our native commodities to those that can supply us with theirs, which we have not, drives us to a necessity of dealing with other people; it is substantially needfull also to order such dealings by, to have some Law or rules generally known, and unquestionably just to both.

There being therefore a necessity of another Law, besides the particular Law of each Countrey, the *Civil Law* has been chosen by most foreign States, because it
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has from the time of the *Romans* run through all Nations, and has been so generally applauded and allowed of by all, that now at last it has purchased to it self the honour to be styled, *Jus Gentium*, the Law of Nations, or *jus commune*, the common Law of all *Europe*, because it hath more in it of the Law of Nature, that is common to all mankind, than any other Law of Man.

Fourthly, The *Civil Law* is of such large extent, and so vast a comprehension, that nothing can fall out, wherein the ministration of Law, equity, or any part of justice may be necessary, which either the words of that Law, or the reason thereof will not decide: For indeed the *Romans*, through the Universal power they had over a great part of the World, and their conversing several ways with the rest, were brought acquainted with the nature and state of all Humane affairs of what kind soever.

Fifthly, It provides not for the welfare and interest of one Nation onely, as a particular Law does, but contemplates and takes care for the general affairs of all people: For it treats of all manner of differences arising between one State and another, of the Laws of war and articles of peace, of leagues, truces, reprizals, rights and privileges of Ambassadors, and redemption of prisoners; of precedencies

due to Princes ; of the freedom of trade to foreigners, and of the restraint thereof upon just and weighty reasons ; of the free and common use of the Sea, and how it may be interdicted or limited ; of all contracts in and about shipping or transportation ; of damages or injuries done at Sea ; of Customs, Wrecks, Pyracies, Salvage or contribution ; of assurances made upon Ships or Goods ; of the carrying of Arms, Money or Men, to furnish or strengthen our enemies ; of the conditions given for the surrendring besieged places, by whom they may be effectually made, and how far they may be extended ; whether change of governour and government can dissolve amity, friendship and respect between us and other States.

These and such-like are matters of concernment to other States as well as to our selves, and are not medled with by Municipal Laws, but fall under the learning of the *Civil Law* onely ; whereby it must needs be accounted a most noble and usefull science ; the profit thereof being not confin'd to one Territory, but communicable to the whole society of Men.

Sixthly, The precepts and rules of this Law are but the dictates of natural reason, and which command the assent and approbation of the most judicious, when first propounded. And so satisfactory and convincing is the justice thereof both

to subjects and strangers of other Nations, that it silenceth the complaints of those, who are thereby condemned, their own reason and consciouſness concurring in that condemnation.

Seventhly, It is the use of the *Civil Law* that holds up the entercourse and correspondence of Nations each with other; for where the rules of judging controversies, as oft as they do arise, are certainly known and allowed of, there any Prince or People will be strongly invited to Trade, make Leagues, intermarry, send their Ambassadors, and communicate all other offices of love and friendship whatsoever: because they know what dealing they shall have from them, and what justice to expect at their hands. But where *illud justum est quod est utile*, that is, where advantage does rather set the rule for justice than right reason; or where it must be administred by prescriptions of their own devising, which none can discern any equity or reason in, nor understand but themselves, such a Nation must make much of themselves, and be contented to subsist of what they have of their own; for no other Prince or People will adventure to deal or correspond with them.

Eighthly, Those that are the composers of this Law, in the ordaining thereof had not, as is usual in the making of other Laws, the advantages of State in
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their eye, nor the honour and greatness of those that had the government, nor any merely politick considerations whatsoever; much less did they look at the particular benefit of any private men. But as in publick matters *salus populi* was *suprema lex*; so in private, *quod æquum bonumque fuit*, was that which made up the Law with them; the dispensation of true right and pure equity was thought the most effectual means to preserve the whole. And hence it is, that the sincere equity of the *Roman Civil Law* has been owned, and the wisdom of it greatly admired by those, to whom the exigencies of the *Roman State*, and the interest of the Rulers of it could not be known.

Ninthly, This Law is so well tempered, and so indifferently composed, that it may be accommodated to any kind or form of government; so that be the Supreme power in one, or be it in few, or be it in the whole people, it is equally usefull for them all: for *Rome* came under all these several forms of government, and some part of the *Civil Law* was made under each of them.

Lastly, Trial, that is the Touchstone of Laws, as of all things else whatsoever, has exalted it above all other Laws of Man. First, in the general use of it every where about the World. Secondly, in the continuance of it to this present time,
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after the State and Government of *Rome* has long ago ceased to be, and against all storms and tempests that have come. Thirdly, in that all States and Commonwealths have exceedingly flourished, that have made use thereof.

And yet we are not such vain exalters of our own profession, as to think, or boast, that the *Civil Law* has the force or property of a Law within it, so as to prescribe to or bind foreign Nations.

But we rather say, by any authority of its own, it commands and necessitates no where, and yet (as reason must always prevail with men that are rational) it informs, illuminates and persuades every where. We say this farther, that though in matters of publick government the Municipal Law bears sway, and is practised altogether in every Nation: for those must be managed by such prudent ways and means, as the supreme Governours from time to time shall think most necessary; without being tied up to any certain rules even of their own, much less to any of the *Roman Empire*: yet in private controversial things, arising between man and man, some special matters of more publick and general concernment excepted, the *Civil Law* is much more practised and more frequently used, than the Municipal. Because in respect of the great variety and multitude of such cases, the Muni-

Leges non allegantur in curiis Principum aut regum pro auctoritate, sed pro ratione sui.
Jas. in l. 19. co. de Collat. nu. 10. Non quia sunt leges Imperatorum; sed quia sunt naturales & bonæ; non quia lex hoc dicat, sed quia Ratio sic vult.
Bald. in l. 13. co. de sent. & interloc. omni. judic.

Municipal Law can declare but little that is certain in them: So that though we cannot say, that foreign States are governed by the *Civil Law*, yet the suits and differences their subjects have one with another, are for the most part judg'd and ended by it. But the admittance of the *Civil Law* in these cases, how general soever they be, is voluntary and free, without either necessity or constraint.

And we do so little think, that the want of a compulsive and binding power does in any part obscure the lustre of it, as in our judgments that very consideration does commend it much more, and makes the merit of it much more conspicuous and splendid; for to be awed by an imposed Law, argues the superiority of the power that imposes it, and the servility and subjection of the people that are under it, but no worth and excellency in the Law it self: for peradventure if they were left to their full freedom, they would chuse to live under some more natural and more reasonable Law. But when a Prince and People shall of their own accord, without direction or command from any other, freely embrace a Law, and desire to be tried and judg'd thereby (as foreign States do by the *Civil Law*) it is an evident token, that this free assuming of such a Law, proceeds from some known singular vertue and rare goodness that is
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in it; for else they would not, being at liberty, be so unanimously guided and directed by the same.

CHAP. IX.

The admittance and sway of the Civil Law in foreign parts, is yet farther verified by the testimonies of Sir Tho. Smith, and Dr. Hakewill, the one a States-man, the other a famous learned Divine of our own, and by some other remarkable institutions within this Nation.

I Have before told you, what a great and renowned King of this Nation, and five great Sages of the National Law have said concerning the same and practice of the *Civil Law* in foreign Nations. I cannot pass by what Sir *Tho. Smith*, a most famous Scholar and States-man of this Nation, and one who in *Queen Elizabeth's* time went Ambassadour to the King of *France*, and so had the opportunity to know more of this matter than those that sit at home, has written *obiter* to the very same purpose, in his book *De Republica Anglorum*.

Anglorum. Wherein after he has delineated and set forth the true state of the policy and form of government within this Commonwealth, and wherein the Laws thereof do greatly differ from that, which other States do observe and follow, in his third book, *cap. 11.* he closes in this manner. *Administrationis & Politiae Anglicanae formam quasi in tabula breviter vobis ad intuentum proposui ; Quid suum habeat, quidque ab aliis rebus publicis, Gallorum, Italarum, Hispanorum, Germanorum, diversum, quae civilibus legibus Romanorum in Pandectas & Codicem à Justiniano redactis reguntur, enarravi.* The form of Policy and government of *England*, saith he, I have as it were in a Map briefly set down before you to be seen, what it has proper to it self, and what differing from other Commonwealths, to wit, of *France, Italy, Spain, Germany*, which, saith he, are swayed by those *Civil Laws* of the *Romans*, that *Justinian* did put into the *Digests* and the *Code*, I have likewise shewed you.

The testimony also of *Dr. Hakewill*, a great Divine of this Countrey also, is as full to the same matter ; for in his learned *Apology* of the power and providence of God, ¹ he does not onely rank the *Civil Law* next to the Law of God, but also avows the professors thereof in some foreign parts to be generally better Scholars than their Divines ; and the Lawyers of this last age to be much more able in their

¹ *Lib. 3. ca. 7. sect. 3.*

their learning and skill, than the Lawyers of former ages have been. Of the which he will have the reason to be, the great sway, interest and employment, which they have had in the Judicial Courts of Christendom, that has given them such encouragement. Next God's Laws, saith he, those of the Empire seem to challenge their place; howbeit with us, having neither that reward nor employment as they deserve, they have lost both their rank and dignity: but in foreign parts, where they are cherished and honoured, they marvelously flourish; insomuch as in some transmarine Kingdoms their Lawyers are held, and for the most part are undoubtedly more sufficient Scholars than their Divines; and within this last Centenary, much more sufficient than the writers and professors of the same faculty in many precedent ages, as well in that part which is professed in Schools, as the practick expressed in Judgments and Pleadings. Now for the latter part, which is the practick, saith he, it may easily be evidenced to any who will be pleased to look into it, that by the observations, experience, pains and learning of the Lawyers of those latter ages, it is grown to much more exactness and perfection than former ages had. Which appears by the judgments, decisions, arrests and pleadings of the highest Courts of the greatest part of the
Chri-

Christian Nations, which are extant in great numbers; as the Decisions of the several Rotes of *Italy*, at *Rome*, at *Naples*, at *Florence*, at *Genoa*, at *Bononia*, at *Mantua* and *Perussum*, and the rest: the judgments of the Imperial Chamber at *Spire*, which is the last resort of the *German* Nation; and the arrests of the several Courts of Parliament in *France*, as *Paris*, *Aiz*, *Bordeaux*, *Grenoble*, and the rest. To which may be added the pleadings of Monsieur *Servine*, the *French* King's Advocate, and others of that nature, which are all published and extant, partly in *Latin*, and partly in their own Languages, with that variety and learning, as much exceeds the former ages.

But to pass from what is observed by our own Countrey-men in this particular, is not there an ancient institution of *England*, that does clearly demonstrate the same thing? for if we were not sure that the *Civil Law* did pass for current, and were generally embraced in foreign parts, why should we always, to this very day, observe to try and decide all differences, that arise between our own Countrey-men and Strangers either upon or beyond the Sea, in the Court of Admiralty; where the proceedings are onely after the form of the *Civil Law*? And were it not to please foreigners in the Law they like and allow of, we might when we had them
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here, strictly hold them to our own Laws. But since we must trade and traffick with them, it were no indifferency to call them from the trial of that Law which they in some part know, and is the Law of their Countrey, as themselves make it, to the trial of a Law which they know in no part, and is mere foreign unto them.

Likewise, if the Treaties that we have had with foreign Princes were surveyed, it would be found, that they run in the language, and are transacted by the skill and knowledge of the same Law. It is evident therefore, that it is used and accepted of every where upon and beyond the Seas; since that where we deal with strangers most, and have most variance with them, there it is most used even amongst our selves.

And to the same ground and reason does Mr. *Selden* in his discourse upon *Fleta* * *Cap. 8. pa-*
* *impute it, that the practice of the Civil* *rag. 4.*
Law has been continued always in the Marshal's Court here in *England*, where divers causes might arise, that might concern strangers; as also in the Judicial Courts in both Universities, where strangers for study sake do frequently come to settle: though for my part I cannot think, that the Universities use it for any other reason, than for the pure natural equity and sound reason that is in it above all the Laws in the World besides; nor for any
other

other end, than that young men trained up and made expert in that profession, when they come abroad, might be more ready in all matters of negotiation and commerce, that the Prince or State should in their dealing with foreign Nations have occasion to use them in, when ever they were call'd to any such employment ; to which the Laws of this Land serve nothing at all.

It is needless in so clear a matter to offer any farther proof to convince our Countrey-men, that all their neighbours beyond the Seas (that are nevertheless wise, rich and potent) do suffer themselves to be judg'd and directed by the *Civil Law*, and the professors of it. I shall therefore as touching this particular add but two things, which in my judgment are very well worth the observation.

The first is, that *Justinian's Code* (which is a Collection of the Emperour's Laws onely, from the days of *Adrian* unto the age of *Justinian* himself) is in use even amongst the *Turks*.¹ In order to which it was, as *Mr. Selden* saith in his discourse upon *Fleta* ;^m that *Mahomet* the second, but the first Emperour of the *Turks* so called, when he had won *Constantinople* from the Christians, he commanded *Maximus* the Patriarch with other books to translate also into Arabick, τὰς νομικὰς τὰς βασιλικὰς, that is, the Imperial Codes, which

¹ Stephan.
Proem. in No-
vel. nu. 64.
^m Cap. 5. pa-
rag. 5.

which was done; *in futurum, ut videtur, Mahumedici imperii usum*, says Mr. Selden; that is, to be usefull for the Turkish Empire.

The second is, that even in the Territory of the Church, where the patrimony and the jurisdiction of the Popes lieth, this Law has in some cases an interest of guidance in the Tribunals there too. And yet if the pretious worth that is in it, did not captivate them, there are not forcible and weighty reasons wanting to make them abhor and decline the same: For,

First, Some of the Christian *Roman* Emperours, as *Constantine, Theodosius, Marrian* and *Justinian*, did ordain divers Laws for the ordering of Church-matters and Church-men; which since the Popes look'd upon as an usurpation, and an incroachment upon their spiritual jurisdiction, Temporal Princes being the disposers of temporal things onely, as they suppose, and not to meddle with spiritual; it might well beget in them an animosity and dislike against the Law it self.

Secondly, the Church has a large Law of their own, the Canon Law; and so large, that it may be thought sufficient to set a rule to all that Churches affairs whatsoever, and need not borrow help from any other Law.

Thirdly, There has always been as it were an emulous contention, which of
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these two Laws should be the most potent, and spread farthest in the Christian World.

Fourthly, The Popes in these latter ages have not stuck to make open protestation, that the Pontifical dignity was rather to give Laws to the Emperours, than receive any from them.

And are not these, if there were no other, grounds enough to make them tender how they admitted the *Civil Law* into their Territories? yet such has been the power and force of that Law, that it has got footing even in that Spiritual Monarchy; for where sin against God comes not to be restrained, or punished, nor the soul and conscience disciplined in order to its spiritual welfare (which was the main end of ordaining the Canon Law) but that the case is merely temporal and worldly, and not decided by the Canon Law, there the *Civil Law* gives the rule even in the Pope's Dominions; *non vi sua*, says *Suarez*, " *sed quia Pontifices ita volunt*, not that it has any authoritative power there inherent in it self, but as the Popes have freely entertained the same. Nay, *Maranta* in his *Speculum*, ° adds farther, and he cites *Feline*, a great Canonist for it; That if the Canon Law has declared it self in the case, but is too strict and rigid, and the *Civil Law* be more fair and equitable, the *Civil Law* shall be rather followed

° *De legib. lib.*
3. ca. 8. nu. 3.

° *Part. 3. nu.*
76.

followed in that case, even in the Churches territory, than the Canon Law it self.

And indeed, setting aside some few special differences between the *Civil Law* and the Canon as to some particulars, the Canon Law is nothing else but the *Civil Law* applied to the use of the Church and Church-matters. And such a conformity there is between them, that *Rebuffus* ^P says, ^{P De Nominat. quest. 5. nu. 14.} the Canon Law is but *Medulla legum & practica juris civilis*; the marrow and substance of the *Civil Law*, and the practical application of it to cases in fact arising. And *Cujacius* plainly averreth, that the Canon Law ^q *ferè omnia sumpsit ex jure Civili, & omnino quicquid praeclarum est in hoc jure, ex jure Civili est, nec hujus interpret idoneus quisquam, nisi sit juris Civilis peritissimus*; it is almost wholly taken out of the Civil, but undoubtedly whatsoever is excellent in it, it has borrowed from the *Civil Law*, neither can any one thoroughly understand the Canon Law, that is not first perfectly skill'd in the Civil. ^{q Ca. 15. De sent. & re judic.}

This is not so truly averred of the Canon Law, but the same may be as justly affirmed of the particular Law of every Nation that is any thing famous either for Laws or Government. For undoubtedly, the best governed Nations have wrote their Laws by the copy of the *Roman*, and the *Civil Law* has been the Womb

that has born and brought forth all of them; neither can they judiciously clear the obscure meaning and doubtfull sense of their own Laws, without they make use of the learning of the *Civil Law*, from whence they sprang originally, for a help to interpret them. And therefore which of them soever does cast out of their Territories the *Civil Law*, they do plainly put out the light of their own Laws, and do abandon and exile that Mother, of which their own Laws, for so much as is good in them; are but the off-spring; since by the testimony of *Claudlan* * *Rome* *Stilicon. lib. 3.* was,

*Armorum legumq; parens, qua fundit in omnes
Imperium, primique dedit cunabula Jovis.*

C H A P. X.

The general name of Jus Civile, The Civil Law, is signally for Honours sake peculiarly ascribed to the Roman Civil Law, and to no other Law.

A Mongst other notes and characters of Honour, that Nations have bestowed upon the *Roman Law*, this is not the least; That it bears to this very day that name and style, which not onely distinguishes it from the Laws of other Nations, but in a way of eminency extols and sets it above them all: for although from that which every City, Countrey or Nation does observe for their binding Law, is derived that particular appellation of the *Civil Law* of that particular place; as the Municipal Law of *England, France or Spain*, may be called *The Civil Law* of *England, France or Spain*: yet he that is to mention the Municipal Law of any one Countrey or Nation, besides the *Roman*, if he would express it by the name of the *Civil Law*, he will not be understood, except he adds the proper name of that Countrey too, whereof he intends to speak.

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But the common use of speaking still to this very day observed by the best and greatest Nations, is clean otherwise, as oft as mention is to be made of the Law of the *Roman* State; for albeit you may call it, *The Civil Law of the Romans*, yet does it pass currently under the simple denomination of *The Civil Law*; and you are intended to speak of that peculiar Law, though you do not subjoin the proper name of that state or people. *Justinian* the *Roman* Emperour did first enact it as a Law, and as a binding direction to the *Roman* people; *Quoties non addimus nomen, cuius sit civitatis, nostrum jus significamus*; ¶ As often as we say, *The Civil Law*, and do not add the name of any City to which it does belong, we mean our own Law. But now it is become the voluntary and free language of such people as are not subject to the Imperial Law.

¶ Parag. 2.
Inst. De ju.
nat. gent. &
civ.

And it is a sure token of a superlative excellency, when a general appellation that is common to all things of the same rank and quality, is specially and by common consent bestowed upon one peculiar thing of the same kind. What was the reason that *Rome* was call'd, *The City*, when there was such a multitude of Cities besides it, but because none came near it in power, greatness, riches or magnificence? Or that *Aristotle*, when there were so many known Philosophers besides, should be
signally

signally named, *The Philosopher*, but because the rest knew not the true essence of things so well as he, nor had dived so deeply into the secrets of nature as he had done? Or that *Virgil* should be styled *the Poet* amongst the *Latins*, and *Homer* amongst the *Greeks*, amidst so many other Poets contemporary with, and a great many others since succeeding them, but because they two far exceeded them all? Or that *Solomon* should be termed, *The Wise man*, and *St. Paul*, *The Apostle*, when certainly wisdom was to be found in others, and in a great proportion too, as well as in *Solomon*; and *Saint Paul* was but one of twelve Apostles; but because the Wisdom of *Solomon* did surpass the Wisdom of all men under the Sun, and *Saint Paul* was thought to be more inspired, and to have greater gifts and endowments given him, than other Apostles had? In like manner, and upon the same ground is it, that although every Nation that is brought under rule and government, and is not barbarous, has a certain peculiar *Civil Law*, under which it lives and is governed; yet out of a general belief, that no other humane Law whatsoever is to be compared with the *Roman Law*, does it still, as anciently it did, carry away the name and title of, *The Civil Law*, from them all, as being the exactest and perfectest of all other Laws in the World besides.

C H A P. XI.

The Art and Knowledge of doing the purest right and most natural justice, is laid down in the Books of the Civil Law; and how it came by degrees to that perfection, that now we see it in.

THE *Roman Civil Law* has not the pre-eminence of other Laws in title and denomination onely, but it is thought also, that in the books thereof there are laid up such treasures of humane Wisdom, Policy, Justice, Equity, and natural Reason, that the art of doing equal justice, and the doctrine of true and uncorrupted right is taught by them onely. *Jus*, said *Celsus*, *est ars equi & boni*; Law is an art informing what is just and good: And *Jurisprudentia*, said the Emperour, *est rerum divinarum atque humanarum notitia, justique injustique scientia*; The science of the Law teaches what is the right both in holy and worldly things, and what is just and unjust; both speaking of the *Roman Law*: so was it accounted then, and no otherwise is it accounted now too. For,

Whereas the learned of the World do reckon upon three supreme Arts and Sciences,

* *Lib. I. Dig. De just. & ju.*

* *Parag. I. Inst. esd.*

ences, Divinity, Law and Physick, which do so mainly support and hold up the whole frame of Man, that without them this goodly link of things here below must needs dissolve and fall away to nothing; by the Art of Law, it is far from their meaning to comprehend the Municipal Law of any Nation, which is fitted for the climate of one people onely, and serves for the exigencies and occasions of the State, and varies as times and occasions, and the dispositions of the men do vary; which commands rather than teaches; which has an eye more to what is profitable to the publick, than what is just and equitable; and which deals more in the great advantages of State, than in settling private interests, or composing differences between man and man: (for this is the true state of the local constitutions of the several and respective Nations and Kingdoms of the World; each of them being far short of deciding those many doubts and questions, that must needs happen in great variety between their subjects, whilst they trade and deal together.) But they understand some more Universal Law, that is commonly embraced and allowed of by the best and most potent Nations; that is full of pure equity and true reason, and being grounded upon dictates of nature and common reason, is unchangeable; whose method is to teach and instruct

struct by certain rules and principles orderly and handsomely digested, as well as to command and order ; and which amongst the frequent and various dealings of men, does leave few cases that can happen undecided.

And it is evident, that by this Art of Law, they intend no other but the *Roman Civil Law* : For although the Laws have been a-making almost ever since *Rome* was first built, and were ordained as questions did arise from time to time, and under several forms of government ; *Rome* being sometimes under the rule of one, sometimes of more, and sometimes of the whole people ; and grew at last to an infinite multitude, and lay in a confused and indigested heap, void of all order or method : Yet at last *Justinian*, when he came to the Empire, did set upon that *opus desperatum*, as he calls it in his *Proœme* to the *Institutes*, that desperate enterprize of disposing them into that admirable order that now we see them in ; and indeed was the first that laid the foundation for the building up of the Art and Science of Law.

By his means it was, that after the best and most usefull Laws were selected and chosen out of a vast and tumultuous heap, they were distributed into Titles, and the Titles into Books, every Title contains those Laws that are proper and pertinent

to that principal subject whereof that Title treateth; sometimes by definition opening the true state and nature of it; sometimes if it be various, dividing it into its several kinds and branches: also subjoining a resolution of the several cases and questions that come under it, rather by the still voice of right reason, and as all men by their natural instinct, and practical experience would agree to determine them, than by severeign command or imperial will.

After this method is that principal part of the Law the Digests, otherwise called the Pandects composed; which *Duarenus* calls the Magazine and Store-house of all equity, justice and learning, and the artificial framing thereof, *Cujacius* * does so much admire, that he judges them to be fools and illiterate, and not to understand, neither what Art is, nor what the principles of Law are, nor how well the Pandects are made, that should require any other Art than what is to be found in them. *Tully*, says *Alciat*, had long and solicitous thoughts, *de jure Civili in artem redigendo*, of making an Art of the Civil Law; but *Justinian* in the Digests hath done that work.

* *Parat. Dig. Mandat.*

But to make this science of the Law yet perfecter, *Justinian* hath also added his book of Institutions, for no other end, but, as himself testifies, *ut sint totius legitima*

prima scientia prima elementa, the introduction to the whole Law, they being indeed the sum and substance of it; and he directs it, *cupida legum juventuti*, to those that shall desire to enter upon that study; intending it as a help to the younger Students onely, whereby they might be enabled after the reading thereof, the better to undertake the more difficult and voluminous books of the Law: for he considering, that the other Volumes of the Law would prove too hard and tedious for young beginners, and so it might come to pass, that the whole study of the Law might be quite laid aside, and utterly perish for want of some to study, the same, he commanded this little book of Institutions to be made, whereby young men might be invited partly with the brieftness, and partly with the easiness thereof, to the study and profession of it. Here then is a great body of Law orderly and methodically disposed, and a book of preliminary Institutions also, to make the entrance into it easier and more beneficial.

But there are two Volumes more of this Law also, the one collected by *Justinian* as the Digests were, and that's the Code; the other ordained by him, as the Institutions were, and that's the Authenticks, otherwise called the Novel Constitutions: for the first is but a bare collection of such decisions, as the Emperours that

that had fate in the *Roman Empire*, even to *Justinian's* time had made to the questions that had been propounded to them, sometimes by Judges, and sometimes by private persons, as in contingency they fell; and are ranked in the same order and method as the Digests are. In the Authenticks there is not that order observed in the disposition of Laws as is either in the Digests, or the Code, but as occasion was offered of any doubt, wherein the Prince's resolution was necessary to every thing, so it is set down without any other method or form. And they were call'd the Novels, because they were new Laws, compared to the Laws of the Digests, Institutions, or the Code; and sometimes they alter and correct the Laws of the other three.

Thus far went *Justinian* himself in his design of a general survey and disposeure of the *Roman* Laws; sometimes ordaining Laws of his own, and sometimes gathering together the Laws of others, till he had made an exact and absolute composition. Which enterprize that renowned Scholar and States-man of our Countrey, Sir *Francis Bacon* does so much commend and admire, in his Epistle to Queen *Elizabeth*, set before his Book of Maxims of Law, that when he understood, that she had the like purpose in her breast, to enter into a general amendment of the State
of

of her Laws, and to reduce them to more brevity and certainty ; he saith, it struck him with great admiration, when he heard it ; and acknowledges it to be one of the most chosen works, and of highest merit and beneficence towards the subject, that ever entred into the mind of any King ; but addeth, that there be rare presidents of it in government, as it cometh to pass in things so excellent, there being no president full in view but that of *Justinian*, as he confesseth. Whose work is the more to be admired, because the use thereof is not local, nor restrained to the state and policy of one Nation onely, as hers would have been, but may serve for the use and benefit of any state or people whatsoever, and is subservient to all accidents and occasions that can happen in common intercourse, and indeed has for its object such things, as commonly arise every-where throughout the World, and have no Municipal or customary Law to determine them.

But if *Justinian* should be thought to have failed in any thing of bringing this Art to a full perfection, yet what the learned of Christendom, from his time downward to this present, have done towards the perfecting thereof, will make it up : for the infinite number of Writers of all sorts, of all Nations, and in all Ages, that have wrote hereupon, are prodigious

ous to behold, and wonderfull to consider.

What Glosses, Notes, Lectures, Repetitions, Commentaries, Paratitles, Analyses, Intellects, are there upon the very Laws themselves? There is hardly any Text of Law that is not copiously written on, either in stating the true reading of it, or in clearing it from obscurity, or in enlarging upon the matter of it. Then as to the general subjects of the Law, and the particular cases and questions that fall under them, both speculative and practical, the Tractates, Discourses, Counsels, Questions, Reports, common Opinions, Controversies, Resolutions, Practices, Observations and Singulars, are without number.

Even this latter age of ours, besides all that which foregoing antiquity has produced, has brought forth every-where in all Countries of renown so many famous Writers in this kind, that every Nation has seemed to be at an emulous contentions each with other, which should most excell in such men.

For *France*, are reckoned *Cujacius*, *Brissonius*, *Adolinaus*, *Antonis Faber*, *Pater Faber*, *Rebuffus*, *Bodinus*, *Tholosanus*, *Gothofred*, *Choppinus*, *Bellonus*, *Papo*, *Charondas*, *Hottoman*, all of high account in that faculty.

For *Spain*, there are famous to this day, *Covarruvias*, *Gomezina*, *Vasquius*, *Alvarez*,
Gregoric

Gregorie Lopez, Bernardus Diaz, Villagut, Pinellus, Franciscus Salgado de Somoza, Sarmientus, Rodericus Suarez, Johannes Lupus.

For Italy, *Gabriel Romanus, Stiaticus, Afsinius, Cephalus, Gigas, Gratus, Palaeotus, Peregrinus, Boffius, Balbus, Putens, Farinacius, Mascard, Zunt, Surdus, Vincentius de Franchis, Mozzius, Sfortia Oddos.*

From Germany came forth not without much estimation and honour, *Gail, Wesenbeck, Minsinger, Schneidwine, Peckius, Hopperus, Revardus, Vulteius, Thomingius, Althufius, Sichardus, Freigius, Pacius, Forsterus, Melchier Kling.*

Every one of these has left such Writings behind him in the *Civil Law*, as will make their memories immortal. Neither can it be any wonder, that the *Civil Law* it self; and the books thereof are grown so voluminous and almost infinite. Because indeed that Science does comprehend that vast and great variety of affairs and worldly business, that the large Nation of the *Romans* dealt in during the long continuance of that great and large Empire. And since have been added unto it, and squared as it were by the rule thereof, and applied unto it, the affairs of many Nations, which must in all changes and accidents, and in each Nation be many, various, and several from the time of that Empire down to this present.

Which

Which being severally writ upon, by several fancies, and in several ways and methods, must needs produce throughout the World large and copious Writings in this faculty, as it has in all other Arts and Sciences besides. But the benefit that the World reaps thereby, lies in this, that there neither is or can be any contract made, or any humane affair transacted, either Domestick, Civil or Military, either between governours and governed, or between the people themselves one with another, or between Nation and Nation, either upon Sea or upon Land, but by the help of that study and the Writings thereof, there may be found most rational rules and directions; sometimes to discern the true nature of the thing it self; sometimes to discern its kinds; sometimes to resolve the doubts and questions that fall under it; sometimes to justifie it as wholly good and lawfull; and sometimes to condemn it as altogether unjust and evil. And if the action be not uniform, but various, and may be in some cases good, and in others evil, it will distinguish upon the several cases; that dealers may walk securely and safely, if they will guide their actions by the prescript of that Law, where the Laws and Customs of their own Countrey do not direct them otherwise.

No part of this pains has been taken, or honour done by the learned of foreign States to the Municipal Law of any Nation, besides the *Roman*; for although every State may wonderfully affect and be delighted with their own Laws, and so it may come to pass, that they may be greatly extoll'd and set up, and sometimes with much industry and great benefit to the subjects interpreted, explained, and writ upon by the Writings of their own Country-men; yet are they of so little esteem and account with Foreigners, that they almost disdain to read them. But where any have employed their Pens in writing upon a Law of another Nation, no one example can be given, but in the *Civil Law* onely; which has busied and set on work the learned of the whole World.

Therefore, what high applause soever may be given to the local constitutions of any people (as questionless they are all usefull within their proper territories) yet it is a truth unquestionable, that in the account of other Nations, whatsoever the case or question be; be it between their own subjects, so that their own National Laws and Customs do not specially order it; or be it between them and other Princes, or their Subjects, the *Civil Law* is the straightest rule and the best guide to decide it by; and the art and skill to dispense equal right and exact justice to all men,

men, is to be learnt from the study of no other Law of Man's creation but that Law onely. *Nihil aliud est jus Civile, quàm sententia quedam à veteribus Jurisconsultis pronuntiata, quæ in certum redacta ordinem, judicandi rationem nostris Jurisperitis ostendunt,* says *Machiavell* himself in his *Proem* to his *Books de Republica*. The *Civil Law* is nothing more than certain dictates or principles declared by the ancient Lawyers (undoubtedly meaning *Papinian, Ulpian, Scaevola, Africanus, Pomponius, Neratius, Celsus, Marcianus*, and the rest, whose names are prefixed before their several Laws in the *Digest*) which being put into good order, do instruct others in the ways of administering right and justice. And hence is it, that in all the Universities throughout the World, I will not except *England*, the Law that is studied, the Law that is publickly read and taught in their Schools, the Law wherein degrees are taken, is the *Civil Law*.

C H A P. XII.

An Answer to the main Objections that are now-a-days made against the continuance of the Civil Law within this Nation.

THese things that have been thus truly delivered to the praise and commendation of the *Civil Law*, being clear and evident, our Adversaries the Anticivilians will not so vainly contend, as to oppose them; or to detract from the worth of that learning, which has been so generally owned by all the World, nor was ever brought into any question, since it was first propagated and made known to other Nations besides the *Roman*. They will, as they must, admit and acknowledge, that the *Civil Law* doth more abound with natural reason and equity, than any other Law of man's establishing; that it has spread farther into the World, than any Law ever did; and has been more studied and adorned with the Writings of the learned of all Nations and Languages, than any Law that yet has been; that the profession thereof is of so large a compass, that it takes in and treats of all the affairs, contracts and dealings of the

the World; that Princes freely entertain it into their Judicatories, and minister right and justice onely by the learned and Graduates of that profession; that the principles of solid Wisdom and best Moral Honesty are taught thereby; that it has described and set down the duties of all people, of what relation soever, more amply, and more to the pattern of nature and right reason than any other Law has done. Yet this free and ample acknowledgment notwithstanding, they will not admit the use and practice thereof in the ministration of Justice within this Nation to be convenient or necessary, suggesting to themselves certain reasons strong and important, as they pretend, why that profession, how learned and wise soever in it self, yet since it is become useles, as to the people of this Nation, cannot conveniently, as our affairs are now changed, be continued here any longer, as they imagine. Which opinion, how well it is grounded, it is meet and requisite we should in the next place examine; for except it may be maintained that it is also usefull and very necessary for the Common-wealth under which we now live, and no way, or at least, in comparison of the great benefits thereof, not considerably inconvenient, all the other excellencies and rare qualities that can be spoken thereof, will turn but into a speculative

and ayrie discourse, and will move nothing towards the begetting of a publick settlement thereof within the Nation: for, they will say, all rules and instructions that are usefull to inform the understanding, and fashion the manners and actions of private men, or of Princes, as they are men onely, may not presently be fitting or necessary to regulate and direct a State in the carrying on of publick business.

Let it therefore be added for a farther commendation of the Imperial Law; First, that as it contains the dictates of nature, the conclusions of right reason, and as it sets forth the natural and essential properties of such humane things, contracts and dealings of men, whereof it treats, (of all which, without comparison, the greatest plenty lies recorded in the Writings of the *Civil Law*) I say, as it contains all these, it is so essentially necessary to the well-ordering of all States, and the common affairs of men, that it cannot be abolished through any change of Law or Government whatsoever, but at the same instant the peace and well-being of that State and People must needs vanish and dissolve also: For can the Sun fall from the firmament, and the World not be at an end? or the soul expire, and the body not be void of life or motion? No more can the splendour of that people

ple endure any longer, where the Sun of natural equity and justice has left to shine amongst them; nor can the body of a Common-wealth grow prosperous or flourishing, that is fallen from the soundness of right reason, which is the very soul and spirit of all Law and Government: for in this it is no otherwise with a whole society of men, than it is with one individual person.

If a man shall be unnatural, and cares not to observe true right and just reason in his dealings with other men, he presently renders himself odious and detestable to all men, and it is lookt upon as dangerous to have any dealings, or to be familiar with such a person. So if a State, which is a collective body of men, when they are appealed to for common right, either by their own people, or by other Nations, shall administer that for right, which crosses natural justice, and the notions of right reason, it exposes it self to scorn and obloquy, it galls and exasperates their own subjects, and makes their neighbours stand at a distance with them: and the condition of that State must needs be dangerous and unsure, having lost their reputation both at home and abroad. Onely here is the difference, and it is a sad one; The danger of a particular injustice determines in some detriment of a few; but national injustice draws after

it oft-times the ruine and confusion of many Nations.

Besides, the impressions of nature and reason are so strong in Man, and so great a part of his essence, that they cannot be quite expunged or deleted in him; neither can they be so long discontinued, but they will at length have their return—

Naturam expellas furcâ licet, usque recurret— and inclinations and affections thereunto will appear, even when the contrary is performed. So true is that of the Civil Law, *Jura naturalia sunt immutabilia*;

7 Parag. II.
Inst. De jur.
nat. gent. &
civil.

The Laws of Nature, and the common reason of Nations are unchangeable, and are not capable to be repealed.

For if it were once admitted, that these Laws were alterable, what strange contradictions and senseless incongruities would follow? And how would man be ravished as it were from himself, his reason one chief part of his essence being taken away? Besides, how would sins and trespasses against nature multiply? How common would unnatural injustice be? and what loud complaints thereof would arise? whereby not onely great confusion would break in, and the peace of the Common-wealth be disturbed, but the common society of Nations would in time also cease. The *Civil Law* then, as it is natural, essential or rational, cannot be repealed.

Secondly,

Secondly, Let it be spoken to its praise also, that the *Civil Law* is so far from being made useless to a Nation, where the whole state of Government has been subverted, as that it is thereby become more usefull and necessary.

It is certain, that the *Roman* people themselves thought it so, when they dispatcht certain chosen men on purpose to fetch it from *Athens* for their use and service, after they had driven out their Kings, suppressed their Laws, and erected a popular Government in place of the Regal. The like opinion possesseth now-a-days the Princes and Potentates of the greatest part of *Europe*, as is clearly demonstrated by their admitting the learning and profession thereof into their several Territories, that it may be at hand to decide and resolve such cases and questions of right, that happen amongst their people, where-in a Law of their own is wanting :

Nay, if any such difference or controverſie arises between the Princes themselves, or between Nation and Nation, which is most frequent and common; because there never was nor can be by any authority a positive Law made to bind them, they debate and argue such differences by arguments fetcht from the *Civil Law*, and allow of the reason thereof as a most competent and equal rule to decide them by.

* And

And if this supply of justice by the learning and knowledge of the *Civil Law* were taken away too, what ignorance, uncertainty, arbitrariness, injustice and oppression would the people of the World lye under? and what hazards of detriment or ruine would their rights, fortunes and estates be exposed unto? for where all manner of Law is wanting in a Common-weal, to doe the acts of justice and ministration of right by, it must be granted, that the light of natural reason must of necessity be the Law; since that was the onely means which was given to man at first to judge and discern by of humane things, before any Law was given. But if that should depend upon the wandring fancies and imaginations of men onely, and not be illuminated by some right knowledge and learning, under how many several shapes and forms must it needs appear, when the apprehensions and conceptions of men through the variety of natural gifts, education, age, knowledge and experience, are as differing, as their visages and persons be?

And where would the certainty, constancy and unity of justice be, when the Judges of the same Tribunal furnished with bare natural endowments onely, would differ from and oppose one another? when one Tribunal shall judge directly opposite to another upon one and the

the same fact, or (which is a levity shameful and unbecoming) when the Judges of the same Court in cases of like nature, shall judge and order diversly from that which they had done before? ² Under which uncertainty and discordance how shall people know what to expect, when their rights come into question? What can any Counsel advise? Or what caution or advisedness can be used by men, to put themselves or their affairs out of jeopardy, when they are never certain of that justice to which they should conform themselves, and be secure?

² *Apud Romanos priusquam sententiam ferrent, præco clara voce iudices hortabatur, Ne se paterentur sui dissimiles esse.*
Bodin. de rep. lib. 6. ca. 6.

By the conversion and change of State therefore, though the Municipal Law goes to wreck (as commonly such great frames are seldom medled withall, but all falls a-pieces) the *Civil Law* is not the less, but rather the more necessary to be retained still; First, because it hath no coherence or conglutination with the particular customs or government, either Regal or Episcopal, as the Municipal Law hath, and so the one may fall, and yet the other stand. Secondly, because the *Civil Law* is the proper Art and Science of that right natural reason, which for want of other rules in the doing of justice, we have said must necessarily be the common standard to try all things by. The principles of which Art and Science are not weak or superficial, but strong and solid; not va-

rious

rious or repugnant, but certain and agreeing ; not harsh and rigorous, but tender, compassionate and equitable ; not partial to any, but alike just to all ; not obscure and perplexed, but clear and perspicuous in the eyes of judicious and right discerning men, though above the reach of the vulgar. Thirdly, because it carries the weight of undeniable authority along with it, the decisions thereof being not the sudden fancies and raw conceits of a few men, nor do they rest upon the bare Reports of any, how learned in the Law soever, but they are the clear evidence of Reason, and the prudent advisements and mature deliberations of a whole State, excelling in wisdom, mighty in greatness, and famous in renown.

And howsoever it was at first ordained to be a Law for a particular Nation to be ruled by, yet has it since been made universal in use throughout *Europe* ; and by the general consent of all the learned sprung up to an Art or Science, to teach natural justice and equity to all mankind. Fourthly, because the reason of the *Civil Law* does not onely rightly inform and teach the understanding what is just and right, but the certainty thereof does keep the judgment steady, and unexposed to those fits of variation and instability, which those that are directed by no certain principles, are subject to ; for it is
not

not easie for them to vary, who have any fixed rules to guide them : So that if this Law were duly applied by those onely that are learned in it (since it is not possible to be done by any other sort of men) neither ignorance, nor error, nor arbitrariness, nor uncertainty of justice, nor the consequences thereof, wrong, injustice or oppression would be found, at least they would not be so frequent and common, as where the guidance and light of such a Law is wanting.

But besides these foregoing reasons, there are yet farther and much stronger reasons to be added, why those matters and causes, which before the present change of government did belong to the trial and determination of the *Civil Law*, should be kept within the same cognisance still, these alterations notwithstanding. First, because for many hundreds of years, that and no other has been the standing, approved and practised Law in those matters, and therefore in that regard to be preferred before any new Law, though better, if such a one could possibly be found. Secondly, because if it should be laid aside, it would be so impossible to find a better; that we should find no Law or Rule at all, to put in the room thereof, that would be able to decide them with any tolerable discretion or knowledge. The professors of the
Muni-

Municipal Law must acknowledge, that their Book-cases (the onely learning of their Law) must needs here fail them, when not any of those matters were ever judg'd or tried before them. Where then would the Law or Rule be found? And surely from that we have before said, it were very inconvenient to commit the trial of them to such as have neither Law or Knowledge proper for the determination of them. Thirdly, because thereby so eminent and so usefull a profession might be kept up; which else to the great dishonour and damage of this Nation must irrecoverably fall, and be quite extinct. Fourthly, because if these things were suffered to go on in their accustomed way, it would make this great change of State to be the less, which in all alterations is to be wished and sought after. Fifthly, because there was nothing in the nature of those causes to tie them to the former government onely; but that they may be tried under the name and authority of the present government, and yet as much according to the course of the *Civil Law*, as they were before; for indeed the *Civil Law* is fitted to act under any government. It can serve the Church, as well as the State; the Popular government, as well as the Regal; and the Aristocratical, as well as either; as we shall clearly find if we look into the States a broad;

broad, as *France*, *Spain*, the Empire, the Territories of the Church of *Rome*, the States of the *Low Countries*, the States of *Italy*, the State of *Venice*, whose differing in point of Government does not hinder, but that the *Civil Law* is used and practised in them all.

The reason whereof is, because it meddles not with matters of government at all, but was originally made to order the private affairs of the people, and to judge the matter of right between party and party onely; as may appear by the very state and purport of the Laws themselves, which are as answers made to questions onely concerning matters of private right and interest, as they did arise from time to time, during the long continuance of the *Roman Empire*. Besides, the *Romans* themselves after they had expelled their Kings, saw several kinds of government, and yet the *Civil Law* served under them all. And if it did not stand indifferent in this point of government, so many Princes and States herein very much disagreeing, would not so freely admit it into their Territories, as they doe; for can we think, that they would consent to the admittance of any thing that might endanger their government? So that it is clear, the change of government that has been amongst us, does not at all hinder, but that as long as the same causes as well
Mari-

Maritime as others, do remain, and must necessarily have a Trial, the *Civil Law*, that tried them before, is the fittest Law to try them still.

It is of as little force and moment, and ought to hinder no more, which is objected, That the *Civil Law* is a foreign Law, not ordained by the Legislative power and authority of this Nation; and therefore very inconvenient it may seem, that matters arising here should be ordered by any other Law, than which is of our own making, or that we should be made to submit to any other. Besides, to have two Laws tolerated in one State, may cause great distraction and uncertainty amongst the people, who may under several pretences be troubled and convented under both for one and the same thing. Farther, the entertaining of the *Civil Law*, may in time be a means to supplant and undermine the Municipal Law and Customs of this Nation.

For as to its being a foreign Law, what is it more in that, than the Laws of the Saxons, Danes and Normans; of the which our English Antiquaries, ^a *Cambden*, ^b *Spelman*, ^c *Cowell* and ^d *Selden*, all take notice, that the Laws of this Nation are but a mixture and composition? And yet it is not such a stranger amongst us neither, as may be conceived; for not onely Antiquity will tell us, that when the Romans were

^a *Britann. fo.*
152.

^b *Glossar. verb.*
lex Anglorum.

^c *Interpr. verb.*
Law.

^d *Notes upon*
Fortescue, ca.
17. *in princ.*

were possessed of this Nation, and during the continuance of their government and power here (which was no less than 500 years) all the affairs of this Nation were ordered and carried on by the *Roman Civil Law*; and had no Law to assist, much less to check it in all that time.

* But also if we look no farther back than twenty years ago, we shall remember the *Civil Law* did so far spread it self up and down this Nation, that there was not any one County, which had not some part of the government thereof managed and exercised by one or more of that profession, besides the great employment and practice it had in the Courts in *London*. So that it being thus incorporated, and; as I may say, naturalized by our selves into this Common-wealth, it ought not to be reputed or look'd upon by us a stranger any longer.

* Cambden's *Britan.* fo. 63.
Selden's *Dissertat. ad Flet.* ca. 4.

Besides, right reason from what hand soever it comes presented, ought to be embraced by us; and is authority enough to it self, to carry the understanding, judgment, will and affections of all men, though it be not put into a Law.

* *Rationabile dictum debet ita movere judicem ad judicandum, sicut ipsa lex. Quia*

lex est omne quod ratione consistit. Itaque sufficit allegare naturalem rationem, licet quis legem non alleget. Jas. in l. 19. Co. De collat. 10.

§ *Imbecillitas est humani intellectus in quacunque causa legem quærere, ubi rationem naturalem inveneris. Bald. in l. scire oportet. parag. sufficit. Dig. De excus. Tut.*

§ But when besides its own commanding power and vertue, it comes withall recommended by such a wise State as the *Roman* was, and framed into a Law by them, and has since been allowed of by o-

ther Nations also, as conforming with the general reason of Man; surely it ought not to be lookt upon as strange and foreign unto us, or to our affairs, carrying about us the same reason, and dealing in the same matters that they did, merely because we did not promulgate and enact the same.

Moreover, if we will deal in foreign affairs, and lanch forth into the wide Ocean, and converse with foreign people, and have to doe with shipping, negotiation and traffick, without which (so populous are we grown) we are not able so much as to subsist or live; or if we would be enabled to stand upon our own defence against a Nation that shall assault us by a war; or revenge unsufferable injuries done us by making war upon them; we must not then stand upon our own Legislative authority, to which other Princes and People will not be obliged; ^a but we must be contented to stand and submit our selves to such a Law how foreign soever, as is proper for those very matters, and to which other Nations do refer them-

^a *Consuetudines vel statuta sunt localia, & sic non obligant nisi subditos. Gail. obs. lib. 2. obs. 124. nu. 5.*

themselves; which is the *Civil Law*, that Nature has breathed out it self in, and Nations have consented unto.

And if it be so necessary for the carrying on of foreign affairs, that they cannot be transacted without it, this shews a necessity of admitting of it also in the agitation of certain matters and causes at home and amongst our selves, for the more ample reward and encouragement of that profession; which can never be maintained or upheld by the transaction of foreign affairs onely; which is not desired neither in any greater latitude or measure, than has been always allowed it heretofore, and where the Common-Law has never known to intermeddle: and in which if the *Civil Law* should not be used, questions and differences would arise, and there would be no Law or Rule found to settle them, which would be a very pernicious thing: So that be the authority of the *Civil Law* foreign, which it cannot be, except it were imposed upon us by some other Nation or People; or be it that it were of no authority at all, but what the necessary assent of our own natural reason, and the consent of Nations gives it; yet it were strange that we should rather chuse to have no Law at all in those matters, than to receive or entertain the same for a help to direct our judgments in them.

It being then so necessary a Law, that but by the knowledge and conduct thereof foreign affairs cannot possibly be carried on, and there would be a manifest failer of justice in other matters at home without it; the supposed inconvenience of having two Laws in one and the same Nation, so much urged against it, will appear to be a very slender and inconsiderable thing; for how can that inconvenience hurt us more, than it does other Nations, that have Municipal Laws of their own, and yet do keep the *Civil Law* too? Besides, it is so far from being an inconvenience, that it is both a benefit and an honour to a people to abound in justice, and to have it rather supplied by two Laws, than to fail in the doing thereof by having but one.

And though where there be two Laws, and two distinct professions of them in one State, if the matters and causes whereof they are severally allowed the cognizance, be not certainly assigned to each, that the one may not enterfere with the other, there may arise a confusion of jurisdictions, and the subject will be uncertain whither to go for justice, and may be in danger to be molested by both Courts for one and the same thing, which were an intolerable mischief: ⁱ Yet the Courts of the *Civil Law* have always had their limits particularly prescribed them, and

ⁱ *Gravium privatorum damno peccatur, cum inter summos magistratus, curiasve majores de imperio certatur.*
Bodin. de rep. lib. 3. ca. 6.

and the causes within their cognizance punctually set down; and if they hold plea of any thing else, there is a known remedy to be had to stop them, by bringing prohibitions from the Common-Law, which are never so soon ask'd, as granted. But if the Common-Law Courts shall draw to their examination such matters as do properly belong to the Civil, (as they have done too often) or do prohibit the Civil from proceeding, where they know they can doe no right, nor give any relief themselves, as in the business of allotting portions amongst the deceased's kindred, which they never did nor can doe, nor will suffer the *Civil Law* Courts to doe it neither, this is an heavy vexation, but the blame must lie upon them. But to be sure, whilst there is such a correcting hand over the Courts of the *Civil Law*, there is little ground of fear that they can trouble or molest the people farther than their just power does authorize them. Which may be sufficient also to remove the jealousies of those that fear, if the Civil should be admitted, it may in time supplant and undermine the Municipal Law of this Nation: For it were a vain attempt for subordinate Courts to go about to shake the standing of that Law, to whose check and controll they lie continually subject.

And if in foreign Nations (that have their Municipal Laws all of them, but no profession, nor Lawyers, nor Judges, but of the *Civil Law* onely) there is not any found so bold and presumptuous, that dares at any time to set up the *Civil Law* above the particular Law or Custome of the place, though opportunities to doe it are not wanting, but that the particular Law or Custome, if any be in the case, does prevail, and has the pre-eminence always ; surely then the Municipal Law and Customs of *England* are much more secure from being invaded and incroached upon, when not onely the Law is distinct, but there is a distinct profession thereof also from the *Civil Law*, that bears a watchfull eye towards its own greatness, and which is more, that has a controlling power, and as it were a Sovereignty over the other. Besides, the very principles of the *Civil Law* do run clean counter to any such design, it being an expresse Maxime in that Law, That the Municipal Law and Custome of any State for what concerns those that are subject to it, ought to be preferr'd before any more Universal Law that is to the contrary.

* Gail. obs. lib. 2, obs. 124.
nu. 2.

Lex Municipalis sive consuetudo juri communi derogat ; * *Lex cujusque loci inspicienda est, sive scripta sit, sive non.*

¹ And

¹ And as I have said before often, so I must inculcate it here still; The *Civil Law*, where-ever it is admitted, it comes without the least prejudice to any, either Law, Custome, or Government, nor alters any thing; but is an auxiliary supplement or a knowledge assisting in the administration of right and justice both to Subjects, and between Nation and Nation,

where there is no Municipal Law in the case, or where it is imperfect and obscure, or where a Local Law is of no authority at all. In the one it supplies, in the other it interprets, in the last it moderates, as a most indifferent Umpire.

So that of these two Laws the proper office and function is, without drawing several ways, and clashing one against another, or questioning each others power, sweetly to join both in that most excellent and divine work of justice, which may render the people of this Nation most quiet within themselves, and honourably esteemed by others.

But lastly, there is a strange conceit that has got into the heads of some men, That the Civil and Canon Law are one and the same, that they cannot be severed, that if the one be admitted, the other

¹ *Gl. in l. 5. parag. 1. Dig. De jur. immunit. verb. legem. Tam in decidendis litigantium controversiis, is qui jurisdictioni præest, consuetudines loci, in quo contractum est, observare debet, quam in delictorum punitione, ejus loci consuetudinem, in quo peccatum est, sequi tenetur, l. si fundus. Dig. de exiēt. Doct. in l. cunctos. Co. De summ. Trinit.*

will have access also, and the letting in of the Canon Law, which was ordained by the Popes and the Church of *Rome*, will open a wide gap to introduce all their superstition, erroneous doctrine, and prelati cal discipline; and so in time we shall become wholly Romish and Antichristian. And truly I must confess, that such a cause, that might produce so dangerous an effect, is not to be neglected, but is to be very carefully look'd after. But as in the one the supposition is greatly mistaken, so there is no such cause of fear in the other, nor any such danger as is surmised: for that these two Laws are the same, or that they are inseparable, is more than a small mistake. They were made at several times, long distant each from other, by several Authours, and for several ends and purposes.

The *Civil Law*, after it had been growing by degrees in a very long process of time, as well under the people, when *Rome* was a free State, as under the Emperours; being become voluminous and indigested; the choicest thereof was pickt out and laid together, by *Justinian*; and that Collection was perfected in the year 533, and made the Law of the Empire, whereof *Rome* was now no part or member, but become the land of the Church, the place for the Popes and Bishops of *Rome* to sit in. Who though they made
Canons

Canons for the rule of the Church and Church-men long before, yet the Canon Law, that is now so styled, came not forth into the World till above 500 years after; the first part thereof, which is *Gratian's* Decree, being not published till the year 1151.

The intent and purpose of the *Civil Law* was, to order and direct all the Civil affairs of the great and spacious *Roman Empire*: And the business of the Canon Law was to guide and govern the spiritual and ecclesiastical matters of the See of *Rome*; the one was ordained to rule a State, the other to discipline a Church. These considerations then dividing and setting a-part these two Laws each from other, do manifestly shew, that they are neither the same, nor for the same end made, nor yet inseparable; for if that mighty State of the *Romans* could manage and carry on so much business as they dealt in, by the *Civil Law* onely, what need has any lesser Nation now to make use of the Canon Law at all? Besides, there has been always such a contention between these two Laws for superiority, and which should have most esteem with the Nations of *Europe*, that they have been rather ready to fight as foes, than unite and agree as friends. Nay, Mr. *Selden*

* writes, that when Pope *Innocent* the second did solicit the *European Princes* and
People

* *Dissert. ad Flet. ca. 6. nu. 5.*

People to give admittance to the Canon Law within their Territories, thinking thereby to enlarge his own jurisdiction and greatness, they did the more freely receive and entertain the *Civil Law*, that they might the better keep off both the Pope and his Law too. So that it should rather seem they are so far from being inseparable, that to entertain the one, is the onely means to shut out the other.

^b *Bilfon* a Bishop of our Church doth defend *Justinian* and the other Emperours, and all Princes in so doing. *Christian subjeſt. Part 2. circa princip.*

^c As may be seen in the History of the Council of Trent, *Lib. 4. fol. 332, 333. and lib. 7. fo. 790.*

And indeed the Canon Law is unnecessary where the Civil is in use; for it is well known, that the latter *Roman* Emperours did, ^b as they might justly doe, make divers and sundry Laws from time to time for the ordering and regulating of Ecclesiastical matters and Ecclesiastical men, as is evident by divers Titles in the Code, *De summa Trinitate & fide catholica; De sacrosanctis ecclesiis; De episcopis & clericis; De hereticis; Ne sanctum baptisma iteretur; De Apostatis; De Judais & Caelicis; De his qui ad ecclesias confugiunt*, and the like. And it is as certain, that ^c there is a multitude of things, which the Popes and the Church of *Rome* have taken upon them to order and make Canons in, *in ordine ad spiritualia*, in order to the spiritual welfare of mens souls, as they pretend, which are Temporal, and matters of civil intercourse between man and man; as may be seen in these Titles.

De

De pactis. De precario. De commodato. De deposito. De emptione & venditione. De locato & conducto. De rerum Permutatione. De pignoribus. De Donationibus. De Testamentis. De Treuga & Pace. De transactionibus. De Decimis, primitiis & oblationibus. De jure Patronatus. De sponsalibus & matrimoniiis. De successionibus ab intestato. De Homicidio voluntario vel casuali. De Raptoribus. De furtis. And divers others.

And all these things in their true nature are but temporal, and mere matters of Negotiation, or actings between man and man, though some of them, as Tythes, Presentations to Benefices, Marriages, Testaments, Successions to Dead mens goods that have died intestate, and other such like, are by the Church of *Rome* accounted spiritual, and through indulgence of divers Princes for the Honour of the Church, the jurisdiction in them has been granted unto spiritual men. But that has proceeded rather from the favour of Princes, than from the ^d nature of the things themselves.

^d Bishop *Bil-*
son saith, That
the Pope's
decrees, judg-

ments and executions in these cases, if claimed from Christ as things spiritual, and not granted by *Cæsar*, are but open invasions of Princes rights, calling those things spiritual, which indeed be civil and temporal. *Christian Subject. part 2. circa med.*

And

And whosoever does take a survey of the Canon Law in the Titles above mentioned, and in divers others, he shall find it most taken out, and speak the very language of the *Civil Law*: and so much is noted and observed all along by the very Gloss and Canonists themselves. So that hereby the Canon Law appears to be of little use, when for the ordering of those matters, we may be supplied from the fountain it self, from whence the Canon Law has got it. But suppose there were such a necessary concomitancy between these two Laws, and that the use and practice of the one would be a sure inlet to the other, as some do too fondly imagine; does it therefore follow, that the errors and superstitions of the Church of *Rome* must needs creep in too? No more surely, than it follows, that because the old Law, that is full of Jewish Rites and Ceremonies, is joined to the Gospel, and that we read both together, we must therefore presently all become Jews.

And thus having satisfied all scruples, that are usually made against the continuing the *Civil Law* within this Nation; I shall but shut up all in this conclusion: That seeing the *Roman State*, out of their
won-

wonderfull wisdom and great experience in government, and the several affairs of the World, did devise a Law not onely proper for themselves, but so mainly usefull to other Nations also; and that the industry of the learned working upon that foundation, has by Method, Order, Rules, Expositions, Illustrations and Treatises of all kinds, reduced it to a perfect and complete Art and Science of Law, whereby the right skill and way of doing the purest and most natural justice, whatsoever the case be, may be taught and known; And when it has from thence been ingrafted into our own and the other Universities of *Europe*, and made one of the three chief Sciences there, to which the rest of the Arts serve as it were as handmaids and servants; and all for the directing of men and Nations, how they should deal honestly and uprightly with one another; seeing also that our very Martial affairs cannot proceed well, nor be rightly regulated without it; and that those Nations whom we have most dealings and intercourse withall, and to whom we should despise to be any whit inferiour, do not onely keep it, but also have no other profession of Law besides it, and do think their own private Laws to be very insufficient and lame without it; and

that divers matters and causes amongst our selves will remain without any Law at all, except the *Civil Law* be kept to order them, as it did before; Lastly, when the *Civil Law* comes to help and assist, and not to infringe or take away from the Municipal Law at all: If we shall now abandon it, and cast it out of our coasts, or which is all one, if we shall reward and encourage it so slenderly, that no man will either think it worth his pains to study, or his cost to take any degree in it (to which pass it is most visibly come already) I say, if we shall still thus neglect or despise it either way; we shall not onely set light by the Policy and Wisdom of the *Romans*, which all other people are studious to imitate and come as near as possibly they can; but we shall also deprive our selves of one excellent means to improve our knowledge and reason by; our justice without it, being guided by illiterate and irrational principles, will be less satisfactory to the people; our skill in the discipline of War, and in the Laws of Arms will be very defective; the very harmony of learning, that has so long flourished amongst us, will be dissolved, when so considerable a part as the *Civil Law* is broken off from it; other Nations will grow too wise and
subtile

subtile for us, and will turn and wind us as they list ; and our justice at home will be lamed, not being competent enough for the matters we deal in. The consequence of all which will be, mischief at home, and dishonour abroad, which all good Patriots and Lovers of their Countrey will lament to see.

A N

A N
I N D E X
O F T H E
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this Book.

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